103

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Supreme Court, U.S.
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No. 08-297 SEP 2 - 2008

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IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY BEARD, Commissioner,
Pennsylvania Department of Corrections;
PHILIP L. JOHNSON, Superintendent of the
State Correctional Institution, Greene County;
JOSEPH P. MAZURKIEWICZ, Superintendent
of the State Correctional Institution at Rockview,
Petitioners

v.

WILLIAM HOLLAND,
Respondent

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Capital Case

Question Presented

The Pennsylvania legislature enacted a statute (modeled after the federal habeas statute) that established a clear one-year deadline for filing post-conviction petitions, explicitly applicable to both capital and non-capital cases. The federal court of appeals refused to honor the new statutory bar unless and until the highest state court rejected potential arguments against its application to capital cases. Until then, the court of appeals held, it would be unjust to expect defendants to make any effort to comply with the deadline, and the state statute therefore constituted an "inadequate" ground to bar review.

Accordingly, the following question is presented:

May a federal habeas court declare an explicit state statutory bar "inadequate," and therefore unenforceable on habeas review in an entire class of cases, on the ground that application of such a statute is unfair until the statute has been construed by the highest state court and potential arguments against its application have been clearly rejected?

Table of Contents

Page

Question Presented i

Table of Citations iv-viii

Orders and Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1-3

Statement of the Case 3-8

Reasons for Granting the Petition

I. A federal habeas court may not dismiss a state statutory bar as "inadequate" and refuse to enforce it merely because the highest state court has not eliminated all uncertainty by ruling on all potential challenges to the statute. 9-22

II. Only the Third Circuit – and the Ninth – apply "inadequacy" in this broadly intrusive fashion; the other circuits to address the question

Page

presented here have ruled directly to the contrary. 22-26

Conclusion 26

Appendix

United States Court of Appeals for the Third Circuit, Order Sur Petition for Rehearing, April 4, 2008 App. 1-3

United States Court of Appeals for the Third Circuit, Opinion, March 6, 2008 App. 4-34

United States District Court, Eastern District of Pennsylvania, Opinion, April 25, 2001 (excerpt) App. 35-114

Pennsylvania Supreme Court, Opinion, April 1, 1999 App. 115-129

Philadelphia Common Pleas Court, Opinion, September 16, 1996 App. 130-181

Table of Authorities

	Page
Federal Cases	
Ake v. Oklahoma, 470 U.S. 68 (1985)	4, 5, 7, 8, 20, 21
Barksdale v. Lane, 957 F.2d 379 (7th Cir. 1992)	23
Beard v. Banks, 542 U.S. 406 (2004)	15
Bradshaw v. Richey, 546 U.S. 74 (2005)	15
Carey v. Saffold, 536 U.S. 214 (2002)	16
Coleman v. Thompson, 501 U.S. 722 (1991)	10
Collier v. Bayer, 408 F.3d 1279 (9th Cir. 2005)	24, 25
Duvall v. Purkett, 15 F.3d 745 (8th Cir. 1994)	24
Evans v. Chavis, 546 U.S. 189 (2006)	15
Fahy v. Horn, 2003 U.S. Dist. LEXIS 14742 (E.D. Pa. 2003)	18

Page

Flores v. Quarterman, 467 F.3d 484 (5th Cir. 2006) 19

Ford v. Georgia, 498 U.S. 411 (1991) 10

Lattimore v. DuBois, 311 F.3d 46 (1st Cir. 2002) 19

Ledebun v. Baskerville, 2001 WL 348031 (E.D. Va. 2001) 23

Lee v. Kemna, 534 U.S. 362 (2002) 10

Lewis v. Jeffers, 497 U.S. 764 (1990) 16

O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996), aff'd 521 U.S. 151 (1997) 23

Pace v. DiGuglielmo, 544 U.S. 408 (2005) 19

Peterkin v. Horn, 176 F. Supp. 2d 342 (E.D. Pa. 2001) 18

Pursell v. Horn, 187 F. Supp. 2d 260 (W.D. Pa. 2002) 18

Rollins v. Horn, 2005 U.S. Dist. LEXIS 15493 (E.D. Pa. 2005) 18

Sloan v. Delo, 54 F.3d 1371 (8th Cir. 1995) 24

Page

United States v. Marcello, 212 F.3d 1005 (7th Cir. 2000) 19

Yarris v. Horn, 230 F. Supp. 2d 577 (E.D. Pa. 2002) 18

State Cases

Commonwealth v. Abu-Jamal, 720 A.2d 79 (Pa. 1998) 13

Commonwealth v. Alcorn, 703 A.2d 1054 (Pa. Super. 1997) 12, 15

Commonwealth v. Alcorn, 724 A.2d 348 (Pa. 1998) 12

Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999) 13

Commonwealth v. Conway, 706 A.2d 1243 (Pa. Super. 1997) 15

Commonwealth v Crawley, 739 A.2d 108 (Pa. 1999) 15

Commonwealth v. Cross, 726 A.2d 333 (Pa. 1999) 15

Page

Commonwealth v. Fahy, 737 A.2d 214 (Pa. 1999) 15

Commonwealth v. Freeman, 827 A.2d 385 (2003) 15

Commonwealth v. Gamboa-Taylor, 753 A.2d 780 (Pa. 2000) 15

Commonwealth v. Holland, 543 A.2d 1068 (Pa. 1988) 5

Commonwealth v. Holland, 727 A.2d 563 (Pa. 1999) 7

Commonwealth v. Peterkin, 722 A.2d 638 (Pa. 1998) 15

Commonwealth v. Yarris, 731 A.2d 581 (Pa. 1999) 15

In re Gallego, 18 Cal. 4th 825 (1998) 25

Docketed Cases

Thomas v. Beard, No. 00-803 (E.D. Pa., August 19, 2005) 18

	Page
Federal Statutes	
28 U.S.C. 1254(1)	1
28 U.S.C. § 2244(d)	11, 19
28 U.S.C. § 2254	7
State Statutes	
26 Pa. Bull. 2296	12
27 Pa. Bull. 4298	12
42 Pa. C.S. § 9542	12
42 Pa. C. S. § 9545	3, 6, 11, 12
Pa. R. Crim. P. 905(A)	13
Miscellaneous	
C. Wright, A. Miller & E. Cooper, 16B Federal Practice and Procedure, § 4027	10

Orders and Opinions Below

The order and opinion of the Third Circuit Court of Appeals, dated March 6, 2008, affirming the grant of limited habeas relief to respondent William Holland by the U.S. District Court for the Eastern District of Pennsylvania, is reported at 519 F.3d 107, and is reproduced at App. 4-34.

The order of the Third Circuit, dated April 4, 2008, rejecting the parties' simultaneous requests for rehearing en banc, is unreported, and is reproduced at App. 1-3.

The District Court's order and opinion, dated April 25, 2001, vacating respondent's capital sentence, is reported at 150 F. Supp. 2d 706, and is reproduced in relevant portions at App. 35-114.

Statement of Jurisdiction

This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

Section 9545 of The Pennsylvania Post-Conviction Relief Act ("PCRA") provides, in pertinent part:

9545. Jurisdiction and Proceedings.

* * *

(b) Time for filing petition. –

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided

> in this section and has been held by that court to apply retroactively.

42 Pa. C.S. § 9545 (Purdons 1998).

Statement of the Case

The federal court of appeals vacated the death sentence imposed by a state court jury and upheld on direct and collateral appeal by the state supreme court. The claim on which the federal court granted relief was never raised by respondent in state court. But the federal court held that he never had to try to do so, because the state's flat one-year filing deadline for post-conviction claims was not adequate to put respondent on notice that the deadline would actually apply to him.

The crime occurred two and a half decades earlier, in the early morning hours of August 11, 1984. Respondent broke into the apartment of a seventy-one-year-old woman, through the window. He stabbed her in bed, first with a jagged onion peeler and then with a knife. When she held up her arms to try to defend herself, respondent slashed through layers of skin and muscle, down to the bone. App. 38-39, 133; trial testimony notes at 1.70, 2.4, 2.67, 4.35.

Next respondent ripped off the woman's pajamas and tied her up with them. He attempted to force his penis into her mouth, her vagina, and her rectum. Then respondent spent some time sticking pins into the victim's feet.

Respondent ransacked the woman's apartment looking for money. He found a piggy bank, which he smashed open to steal the few dollars inside. Before leaving, respondent paused to smoke a Marlboro. App. 38-39, 133; trial testimony notes at 1.87, 2.4, 2.57, 2.67-68.

Respondent was arrested several days later and confessed to the crime. The victim, who had been rushed to the hospital after a neighbor heard her cries, died. App. 39-40, 133; trial testimony notes at 2.9-11, 2.24-43, 2.68.

Before trial, defense counsel requested appointment of a psychiatric expert. The trial judge complied, noting that the expert would be available to consult with both sides. This Court shortly thereafter decided *Ake v. Oklahoma*, 470 U.S 68 (1985), concerning appointment of defense psychiatric experts. But respondent never complained that the expert already appointed was insufficiently available to him or otherwise inadequate under *Ake*. Counsel consulted with the appointed expert in an effort to develop both trial defenses and sentencing mitigation evidence, but the expert had been unable to discover mitigation information that would be helpful rather than harmful. App. 141-175.

Respondent came to trial before a jury in June of 1985. The jury found him guilty of first degree murder, burglary, robbery, and attempted deviate sexual intercourse. At the penalty hearing, defense counsel presented family members who testified to respondent's emotional and psychological history. The jury returned a verdict of death on the basis of three aggravating circumstances: that respondent tortured the victim, that he intentionally murdered her in perpetration of a felony, and that his prior record of seven armed robberies constituted a significant history of violence. App. 40, 130-134.

Respondent appealed to the Pennsylvania Supreme Court, represented by new counsel. He raised several federal claims, including ineffective assistance of trial counsel, but nothing about *Ake v. Oklahoma*. On May 20, 1988, the Pennsylvania Supreme Court rejected all of his claims, affirming his judgment of sentence. *Commonwealth v. Holland*, 543 A.2d 1068 (Pa. 1988).

In October 1994, respondent filed a petition under Pennsylvania's Post-Conviction Relief Act, and was again appointed new counsel. Once again, respondent raised ineffective assistance of counsel claims, but again nothing about *Ake v. Oklahoma*. App. 115-181.

On November 17, 1995, while respondent's petition was pending at the trial court level, the

Pennsylvania legislature adopted a statute establishing a one-year time limit relating to all applications for collateral relief (including, specifically, petitions in capital cases). The legislation was to become effective sixty days later, as of January 16, 1996. 42 Pa. C.S. 9545(b). App. 49-50.

The new filing deadline had no effect on already-pending collateral petitions such as respondent's. Nor did the statute alter existing state law that allowed respondent to freely amend his existing petition at any point if he wished to add additional claims. The statute did on its face, however, make clear that respondent would not be able to file a new collateral petition after the pending petition was finally resolved.

Respondent nonetheless did nothing, then or at any other point in state court, to ensure that all potential claims would be exhausted in light of the new statutory time bar. Instead, he proceeded only on the original claims in his pending post-conviction petition. App. 115-129.

The post-conviction court held a two-day evidentiary hearing on petitioner's claims, including a claim that trial counsel was ineffective for not developing mental health claims. Witnesses included trial counsel, who was now a judge in Florida, direct appeal counsel, and a new psychiatric expert who had been appointed on respondent's behalf. The expert acknowledged that he could find no evidence of any psychosis or major mental illness, but stated that respondent's emotional development was impaired, and that he could have testified about respondent's psychological history more persuasively than the family members who appeared at trial. The post-conviction court rejected the expert's testimony and, on September 16, 1996, denied the collateral petition. App. 130-181.

Respondent again appealed to the Pennsylvania Supreme Court, and yet again failed to invoke *Ake*. On April 1, 1999, the Pennsylvania Supreme Court affirmed the post-conviction court's ruling. *Commonwealth v. Holland*, 727 A.2d 563 (Pa. 1999). App. 115-129. Although the new statutory filing deadline would now bar new petitions, respondent had done nothing over the three years since its enactment to incorporate additional claims into his collateral challenge.

Instead, in January 2000, respondent petitioned for habeas relief in federal district court, pursuant to 28 U.S.C. § 2254, raising a variety of claims, including for the first time a charge of *Ake* error. Specifically, respondent argued that his due process rights under *Ake* had been violated because the trial court had not appointed an additional, defense-oriented expert, to assist him at trial and to present mitigating evidence. App. 68-69, 98-100.

In April 2001, the District Court issued an opinion and order, holding as a threshold matter that respondent's *Ake* claim had been procedurally defaulted and would now be barred under state law because of the state filing deadline. The District Court found respondent's *Ake* claim reviewable anyway, however, because "cause and prejudice" allegedly existed to excuse his procedural default. The District Court concluded that the *Ake* claim had merit with respect to the penalty phase of his trial, and rejected on the merits all of his other allegations. On this basis, the District Court vacated respondent's death sentence. The parties filed cross-appeals in the court of appeals. App. 86-114.

In March 2008, the court of appeals upheld the death sentence ruling, but on different grounds. The court held that respondent's *Ake* claim was reviewable because it was never really defaulted in the first place. That is because, held the court, the state post-conviction filing deadline was not clearly applicable – not because its language was not clear, but because the state supreme court had not yet held that it would follow that language. On that procedural basis, the Third Circuit summarily affirmed the District Court's grant of penalty-phase habeas relief under *Ake*. The court subsequently denied requests for rehearing. App. 1-3, 10-29.

Reasons for Granting the Writ

I. A federal habeas court may not dismiss a state statutory bar as "inadequate" and refuse to enforce it merely because the highest state court has not eliminated all uncertainty by ruling on all potential challenges to the statute.

The court of appeals has invented and imposed an unrealistic and intrusive standard for assessing the "adequacy" of a state's statutory filing deadline for post-conviction litigation. According to the court, when a state legislature enacts a new procedural requirement, no matter how clear on its face, criminal defendants should not be expected to follow it unless and until potential arguments against its application have been resolved by the highest state court. In other words, litigants are entitled to sit back and wait until the state courts announce that the state statute in fact means what it says. And when such lassitude generates a procedural default in state court, federal habeas courts can disregard the state rule as "inadequate," forgive the default, and review claims that never were but could have been raised before.

Such a standard makes a mockery of the proper relationship between the components of a federal system. It is worth remembering that federal habeas courts are not in business to assess the wisdom of state procedural rules. They broach such questions only by a tangent, through the doctrine of procedural default. Under that doctrine, a habeas petitioner who has violated a state rule of procedure is barred from federal review, because the default is an adequate and independent state ground for the result. *Coleman v. Thompson*, 501 U.S. 722 (1991).

In that limited context, federal courts may indeed consider the "adequacy" of a state procedural rule – but they have no greater power to nullify a state rule than they would a federal rule. In either case, the question is essentially one of due process. Although the "adequacy" notion has been formulated in various ways, the basic principle is that a state procedural rule will be deemed an "adequate state ground" when the litigant has fair notice of its existence, the rule serves a legitimate state interest, and the litigant has a reasonable opportunity to raise his federal claims.[1]

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[1] *See, e.g., Lee v. Kemna*, 534 U.S. 362, 376 (2002); *Ford v. Georgia*, 498 U.S. 411, 423-424 (1991) (ultimate adequacy question is whether petitioner could fairly be deemed to have had notice of state's procedural rule in order to tailor his litigation to comply); *see generally* C. Wright, A. Miller & E. Cooper, 16B *Federal Practice and Procedure*, § 4027, p. 392 (2d ed. 1996) ("most workable" test for "adequacy" of state rule is whether procedure affords litigants "reasonable opportunity to assert federal rights, without placing unreasonable obstacles in the way").

It would be absurd to suggest that Pennsylvania's statutory post-conviction filing deadline – duly passed, published, and applied – violates such basic due process principles. The Pennsylvania Legislature, after many months of hearings and debate, enacted its legislation in response to growing concerns about post-conviction delay in both capital and non-capital cases. The time bar statute was largely modeled upon a similar provision in the federal habeas reform package that was then moving through Congress, and eventually became 28 U.S.C. § 2244(d). Like the federal provision, the state statute gave petitioners one year to file from the conclusion of direct review, with three exceptions to account for claims that could not have been previously raised. 42 Pa. C.S. § 9545(b).

Other features of the legislative process made clear that the statute really would change things in Pennsylvania. The legislature was aware that, in the past, the state courts had exercised discretion in applying certain procedural bars, particularly in capital cases. An attempt to codify such a "miscarriage of justice" exception in the time bar, however, was considered and rejected.[2] Instead, the legislature explicitly made the new deadline jurisdictional, 42 Pa. C.S. § 9545, so that courts would be without discretion to create their own exceptions. The legislature also added language to the post-conviction statute to state explicitly that the new provisions would apply to capital cases. 42 Pa. C.S. § 9542.

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[2] *See* Pennsylvania Legislative Journal – House, First Special Session, at 510-12, 517-19 (October 30, 1995) (debate on proposed amendment to add "manifest injustice" exception).

From that point forward, the new provision unfolded exactly as written. The filing deadline took effect following a 60-day grace period from the date of enactment to allow for fair notice. Laws of Pennsylvania, Act 1995-32 (1st Spec. Sess.), Sections 3-4. Shortly thereafter, the Pennsylvania Supreme Court's criminal rules committee published a proposal to incorporate the deadline into the procedural rules governing post-conviction petitions, so as to provide ongoing notice of the time bar. 26 Pa. Bull. 2296. The Pennsylvania Supreme Court officially adopted the published rules the following year. 27 Pa. Bull. 4298.

Then the first published appellate decision addressing the new time bar was released. *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super. 1997) (post-conviction filing deadline, unlike other procedural bars, was enacted as jurisdictional limit; courts therefore were without power to disturb the legislative scheme). Several months later the state supreme court denied discretionary review of the decision. *Commonwealth v. Alcorn*, 724 A.2d 348 (Pa. 1998) (mem.) Finally the supreme court issued a series of its own published opinions addressing the time bar. *E.g., Commonwealth v. Banks,* 726 A.2d 374 (Pa. 1999) (court's "relaxed waiver" practice, under which certain procedural violations were sometimes excused in capital cases, could not be applied to new post-conviction filing deadline; courts were without power to interfere with the clear legislative mandate).

After all this, no reasonable litigant, capital or non-, could have felt safe in ignoring the statute. But that is exactly what respondent did. He could easily have escaped the effects of the new bar, because he already had a post-conviction petition that was pending before the new time bar took effect. Under state law, respondent could freely have amended that petition to include any additional claims he desired. Pa. R. Crim. P. 905(A) (amendments to post-conviction petition "shall be freely allowed to achieve substantial justice"). Indeed even after the trial court denied the petition (ten months after enactment of the statute put him on notice of the time bar), respondent could have sought a remand from the appellate court to develop further claims below. *See, e.g., Commonwealth v. Abu-Jamal,* 720 A.2d 79, 86-87 (Pa. 1998) (remanding, on two separate occasions, during pendency of post-conviction appeal for new evidentiary hearings).

Yet respondent did none of this. Instead, he waited until he reached federal habeas court, where – presto – he promptly produced a slew of new claims.

Those claims should have been readily dismissed. Remarkably, however, rather than hold respondent to his deliberate bypass of available state court process, the federal court of appeals excused every default and vacated respondent's death sentence on the basis of one of his newly-presented issues.

Before doing so, the court of appeals conceded that the language of the state statutory bar was clear on its face. App. 15-20. The court also openly acknowledged that respondent could have exhausted his new claims in state court if he had only tried. App. 19-27.

Nevertheless, held the court, *no such effort was necessary*. Instead, when the statute was passed, respondent was entitled to assume that the deadline would never be imposed against him, because his was a capital case, and in the past the state courts had on occasion "relaxed" their waiver requirements in order to resolve significant capital issues. App. 19-20. Under the court of appeals rationale, therefore, respondent could presumably plan on saving some claims for a future post-conviction petition, or a whole string of petitions if he so chose, without fear that they would ever be defaulted – despite the plain language of the new statutory filing deadline.

As noted above, the circuit court's speculation about what could have happened in state court was completely at odds with what actually did happen. State judges did not flout the new filing deadline; they followed it, strictly and uniformly, as it was written.[3] The state supreme court did not use "relaxed waiver" to trump the time bar in capital cases; on the contrary, the court explained that the doctrine was discretionary, not a matter of entitlement on which litigants could rely. *Commonwealth v. Freeman*, 827 A.2d 385, 400 n.9 (2003).[4]

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[3] *See, e.g., Commonwealth v. Alcorn, supra.*; *Commonwealth v. Conway*, 706 A.2d 1243, 1244 (Pa. Super. 1997); *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998); *Commonwealth v. Cross*, 726 A.2d 333, 608-14 (Pa. 1999); *Commonwealth v. Yarris*, 731 A.2d 581, 586-87 (Pa. 1999); *Commonwealth v. Fahy*, 737 A.2d 214, 217-24 (Pa. 1999); *Commonwealth v Crawley*, 739 A.2d 108, 109-110 (Pa. 1999); *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780, 783-88 (Pa. 2000).

[4] Although the circuit court apparently declines to accept the state supreme court's characterization of its own practice, this Court does not. *See Beard v. Banks*, 542 U.S. 406, 412 (2004) (quoting *Commonwealth v. Freeman*).

See also Evans v. Chavis, 546 U.S. 189, 200 (2006) (even when U.S. Supreme Court has interpreted state law, high court of state is "free to tell us if . . . we were wrong"); *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (it is well-settled that "state court's interpretation of state law ... binds a

(continued...)

But none of that mattered in the court of appeals. All that did matter, in the court's view, was that it *might* have worked – a capital defendant just *might* have persuaded a Pennsylvania judge to defy the plain language of the statute. As a result, how could a litigant have known, with absolute certainty, that untimely claims would be defaulted? Indeed, suggested the court of appeals, the issue "did not become perfectly clear" until as late as March 1999, when the state supreme court finally discussed "relaxed waiver" in relation to the time bar. App. 19-23. Absent the perfect clarity of such a final high court decision, not even an explicit warning about the time bar, personally delivered to respondent by the post-conviction judge, would have been sufficient to render the state filing deadline enforceable on federal habeas review. App. 25-29.[5]

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[4](...continued)
federal court sitting in habeas corpus"); *Carey v. Saffold*, 536 U.S. 214, 226 (2002) (state courts' interpretation of state timeliness provisions is binding upon federal courts); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (federal courts may not "peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation" of state laws).

[5] "[E]ven if the PCRA trial court explicitly had warned Holland on December 4, 1995, that he had to raise all of his possible issues and made it clear that it would permit him to do so we could not conclude that Holland's unasserted federal claims were procedurally barred. . . . [T]he

(continued...)

This is an astonishing interpretation of the "adequate state grounds" doctrine. Adequacy is supposed to be about the basic due process notion of fair notice, sufficient to allow litigants to guard their interests. For litigants like respondent, enactment of the Pennsylvania post-conviction time bar should have been like a blaring fire alarm that will not turn off. A genuine effort to exhaust *all* his claims in state court would have protected respondent from default more surely than any challenge to the validity of the filing deadline. Yet the court of appeals ruling essentially encouraged him to cover his ears and pretend as if nothing was happening, until it was too late.

Nor is this untenable precedent in any way limited to this particular case. Numerous other Pennsylvania defendants were at similar stages of litigation when the time bar became law, and entered federal habeas review only in recent years. They will all be able to make the same false claim that they were "misled" because the state supreme

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[5](...continued)
Pennsylvania Supreme Court had not yet rejected the relaxed waiver rule. . . . Thus, . . . a definitive warning that issues unless raised then would have been abandoned in the state courts would have been misleading." App. 29.

court did not instantaneously interpret the statute for them.[6]

Worse, there is no clear endpoint to the damage. "Relaxed waiver" is hardly the only potential challenge that can be asserted against the time bar. As long as there are courts, there will be arguments, perhaps even some good faith, reasonable arguments, for new exceptions, or for reconsideration of old rulings. If the statute does not mean what it says, after all, how are we to know that state supreme court decisions mean what they say? If we have to wait for all these challenges to be decided before the statute can become "adequate," we will be waiting until the end of days.

The absurdity of this situation is especially apparent in light of the disparate treatment of the Pennsylvania and federal time bars. The two statutes, as previously discussed, are almost the same. Like the state statute, the new federal filing deadline was quickly subject to an array of challenges, many of which have yet to be finally resolved. Yet no one holds that 28 U.S.C. § 2244(d) is unenforceable until that happens.

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[6] *See, e.g.*, *Thomas v. Beard*, No. 00-803, Slip Op. at 15-25 (E.D. Pa., August 19, 2005) (PCRA time bar inadequate); *Rollins v. Horn*, 2005 U.S. Dist. LEXIS 15493, *9-11 (E.D. Pa. 2005) (PCRA time bar inadequate); *Fahy v. Horn*, 2003 U.S. Dist. LEXIS 14742, *85-88 (E.D. Pa. 2003) (time bar inadequate); *Pursell v. Horn*, 187 F. Supp.2d 260, 292-97 (W.D. Pa. 2002) (time bar inadequate); *Yarris v. Horn*, 230 F. Supp.2d 577, 584-86 (E.D. Pa. 2002) (time bar inadequate); *Peterkin v. Horn*, 176 F. Supp.2d 342, 354-55 (E.D. Pa. 2001) (time bar inadequate).

Indeed in *Pace v. DiGuglielmo*, 544 U.S. 408, 412-13 (2005), this Court recently reviewed a question under § 2244(d) that arose in conjunction with the very same Pennsylvania time bar that is at stake here. The issue in question had caused a circuit split, and the vote in this Court was 5-4 against the prisoner's position. Plainly, the prisoner in *Pace* could not have known with certainty how the statute would be interpreted in the end. Unlike here, however, no such advance certainty was required. Pace simply made an unwise choice about the filing deadline, and was held to the consequences.[7]

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[7] See, e.g., *Lattimore v. DuBois*, 311 F.3d 46, 54 (1st Cir. 2002) (rejecting argument that federal habeas filing should not be enforced against petitioner because it was unclear that the date he filed was too late; "[w]rong guesses, even reasonable ones, as to precisely how a new statute of limitations will be authoritatively applied do not entitle a disappointed petitioner to relaxation of rules once adopted"); *see also United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) ("The petitioners' argument that the deadline was unclear also makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest"; denying equitable tolling); *Flores v. Quarterman*, 467 F.3d 484, 486-87 (5th Cir. 2006) (legitimate uncertainty about

(continued...)

The same effect should have been given to the Pennsylvania statute, but was not. The inescapable conclusion is this. No federal court would do with the federal filing deadline what this federal court did with the state filing deadline.

One final affront to the state courts deserves mention. The claim on which the court of appeals granted relief was that the trial court failed to provide respondent a "non-neutral" psychiatric expert, under *Ake v. Oklahoma*, 470 U.S. 68 (1985), who would have testified at the sentencing phase about respondent's alleged mental disorders. Although respondent never raised an *Ake* claim in state court, he did make a closely related argument: that his trial lawyer was ineffective for not presenting a psychiatric expert to testify about his alleged mental disorders.

The state post-conviction court held a full evidentiary hearing on this claim. For the post-conviction hearing, respondent was provided with a court-appointed psychiatrist, who testified on his behalf about mitigation claims that supposedly could have been presented at the sentencing phase.

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[7](...continued)
proper filing date, due to circuit split, did not justify lateness; "Flores should have elected to err on the side of caution and abide by the earlier of the two possible deadlines"; denying equitable tolling).

That psychiatrist was, in effect, the *Ake* expert that respondent did not have at trial.

After carefully reviewing the expert's testimony, however, the state court found that the psychiatrist had not offered anything about respondent's mental health background that had not already been presented to the jury through other witnesses. The court specifically rejected the claim that the expert's more "clinical manner" would have made a difference at trial, given the damaging nature of most of the "mitigating" mental health evidence, and the horrible facts of the vicious rape-murder respondent perpetrated here. The court therefore ruled that respondent simply could not establish prejudice from the absence of an expert at trial. App. 118-124, 145-162.

In a properly functioning federal system, those findings should have been the starting point, and perhaps the deciding point, on federal habeas review. But the court of appeals *never even mentioned them*. It was as if the whole thing never happened. The Court of Appeals treated its default ruling as a license to ignore the decisions actually made by the state courts, on the claims actually presented to them. That is the kind of result made possible by the circuit court's misuse of the "adequacy" doctrine to negate the state's statutory bar.

It is hard to imagine a more egregious violation of the comity that is required between state and federal courts. Review is warranted.

II. Only the Third Circuit – and the Ninth – apply "inadequacy" in this broadly intrusive fashion; the other circuits to address the question presented here have ruled directly to the contrary.

There are two directly conflicting views among the circuits on the proper way for federal habeas courts to analyze the "adequacy" of a state post-conviction filing deadline.

One view is that state provisions of this type should be treated just as the federal habeas deadline is treated: while reasonable disputes may arise about the manner in which the deadline is to be applied, the mere existence of such questions does not mean that the statutes violate due process and cannot validly be enforced.

The other view is that defendants are not bound to follow state post-conviction deadlines unless the state courts have already applied them to other defendants in the same circumstances; if not, it is the duty of the federal habeas court to disregard the defendant's violation of state law.

These views represent radically different conceptions about the appropriate function of federal courts in reviewing state criminal judgments. This Court should reconcile these competing notions.

The first approach is followed in these circuits:

Fourth Circuit

O'Dell v. Netherland, 95 F.3d 1214, 1241 (4th Cir. 1996) (en banc), *aff'd* 521 U.S. 151 (1997) ("unambiguous statutes or court rules are always 'firmly established," and therefore "adequate," even absent state court applications of the rule).[8]

Seventh Circuit

Barksdale v. Lane, 957 F.2d 379, 382-83 (7th Cir. 1992) (state rule that shortened time for filing post-conviction petition was not inadequate, even though state court had not yet ruled that new rule would be applicable retroactively to litigants in same position as petitioner).

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[8] *See also Ledebun v. Baskerville*, 2001 WL 348031 (E.D. Va. 2001) ("Simply pointing to the absence of case law interpreting and applying the rule does not suffice to exhibit its inconsistent and irregular application").

Eighth Circuit

Duvall v. Purkett, 15 F.3d 745, 748 (8th Cir. 1994) (even where state court cases arguably evidenced confusion about application of state filing deadline, rule was not inadequate; "[s]uch confusion should have persuaded Duvall to file" rather than do nothing).

Sloan v. Delo, 54 F.3d 1371, 1381 (8th Cir. 1995) (rejecting petitioner's argument "that he had inadequate warning that the time limits ...would be enforced strictly because the Missouri Supreme Court had not yet ruled that the time limits in the rule are jurisdictional"; language of rule was sufficiently clear in itself to put petitioner on notice).

The alternative approach is, as discussed above, that of the Third Circuit, joined by one additional court of appeals. In *Collier v. Bayer*, 408 F.3d 1279, 1283-1286 (9th Cir. 2005), the Ninth Circuit held that Nevada's one-year post-conviction statutory filing deadline was "inadequate" because the "unique circumstances of [the defendant's] case" had not previously been addressed in the state courts. While not explicitly faulting the state court for attempting to address those circumstances when they were presented by the defendant's case, the federal court of appeals did not feel that the state court's result was sufficiently well-grounded in state law as to have provided the defendant with adequate advance notice that he would lose. Accordingly, as in the Third Circuit, the defendant was entitled to circumvent his state court time bar and proceed directly to federal habeas court for review.

One judge, however, was understandably troubled. He noted that such a result would only invite Nevada prisoners to "mock" the state deadline. As the judge observed:

> [T]he majority presumes that a statute is not well-established unless a court has ruled that the statute means what it says. This ruling will lead to all sorts of mischief. Habeas petitioners have a duty to follow the plain language of a State's procedural rules, even where no State court has yet rejected the precise attempt made by the petitioner to circumvent those rules.

Id., 408 F.3d at 1289 (Bea, J., dissenting) (citation omitted).[9]

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[9] It is no surprise that state judges have expressed frustration with the apparent eagerness of some federal courts to declare state rules inadequate. *See, e.g., In re Gallego*, 18 Cal. 4th 825, 851 (1998) (Brown, J., concurring

(continued...)

The Ninth Circuit dissent only echoes the larger circuit split. This Court should resolve the conflict among the courts of appeal, and restore "adequacy" analysis to its proper role in habeas corpus litigation.

Conclusion

For these reasons, petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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[9](...continued)
and dissenting) ("We are no closer to the ever-receding dream of adequate state grounds and farther from the goals of finality and comity. ... In my view, it is time to recognize our procedural bars do not preclude federal court merit review and probably never will").

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-9001 and 01-9002

WILLIAM HOLLAND,

Appellant in No. 01-9001

v.

MARTIN HORN, COMMISSIONER,
PENNSYLVANIA DEPARTMENT OF
CORRECTIONS; PHILIP L. JOHNSON,
SUPERINTENDENT OF THE STATE
CORRECTIONAL INSTITUTION, GREENE
COUNTY; JOSEPH P. MAZURKIEWICZ,
SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW

WILLIAM HOLLAND

v.

MARTIN HORN, COMMISSIONER,
PENNSYLVANIA DEPARTMENT OF
CORRECTIONS; PHILIP L. JOHNSON,
SUPERINTENDENT OF THE STATE
CORRECTIONAL INSTITUTION, GREENE

COUNTY; JOSEPH P. MAZURKIEWICZ,
SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW,

Appellants in No. 01-9002

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 99-02551)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, *Chief Judge,* and SLOVITER, MCKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENBERG, and COWEN, *Circuit Judges*

The petitions for rehearing filed by appellant in No. 01-9001, William Holland, and appellants in 01-9002, Martin Horn, commissioner of the Pennsylvania Department of Corrections, Philip L. Johnson, superintendent of the state correctional institution, Greene County, and Joseph P. Mazurkiewicz, superintendent of the state correctional institution at Rockview, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court en banc, the petitions for rehearing are denied. Judge Greenberg's vote and Judge Cowen's vote are limited to denying rehearing before the original panel.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: April 4, 2008
CMD/cc: David C. Glebe, Esq.
David W. Wycoff, Esq.
Matthew C. Lawry, Esq.
Ellen Berkowtiz, Esq.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 01-9001 and 01-9002

WILLIAM HOLLAND,

Appellant in No. 01-9001

v.

MARTIN HORN, COMMISSIONER,
PENNSYLVANIA DEPARTMENT OF
CORRECTIONS; PHILIP L. JOHNSON,
SUPERINTENDENT OF THE STATE
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PENNSYLVANIA DEPARTMENT OF
CORRECTIONS; PHILIP L. JOHNSON,

SUPERINTENDENT OF THE STATE
CORRECTIONAL INSTITUTION, GREENE
COUNTY; JOSEPH P. MAZURKIEWICZ,
SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW,

Appellants in No. 01-9002

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 99-02551)

Honorable Franklin S. VanAntwerpen,
District Judge

Argued December 18, 2007

BEFORE: CHAGARES, GREENBERG,
and COWEN, *Circuit Judges*

(Filed: March 6, 2008)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

I. INTRODUCTION

This matter comes on before this Court on an appeal and cross-appeal from a final order entered in the District Court on April 25, 2001, in this habeas corpus action under 28 U.S.C. § 2254 following extensive proceedings in the Pennsylvania state courts leading to appellant William Holland's conviction at a jury trial bifurcated between guilt and penalty phases on, among other charges, first degree murder. Following Holland's conviction the jury in the second phase of the trial imposed the death penalty. Subsequently, after the Pennsylvania Supreme Court affirmed Holland's conviction and sentence, he filed a state post-conviction relief application but the trial court denied the petition and the Pennsylvania Supreme Court affirmed the denial. Consequently, we hardly write on a blank slate as the Supreme Court set forth the background of the matter in its opinions. *Commonwealth v. Holland,* 543 A.2d 1068 (Pa. 1988); *Commonwealth v. Holland,* 727 A.2d 563 (1999). Furthermore, the District Court reiterated the background of the case in an exceptionally comprehensive opinion in which it granted Holland relief with respect to the penalty phase of the bifurcated state proceedings but denied him relief with respect to the guilt phase and thus from the conviction for the murder. *Holland v. Horn,* 150 F. Supp. 2d 706 (E.D. Pa. 2001) ("*Holland* ").[1] Holland

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[1] We are not mentioning Holland's convictions for the other offenses in this opinion again. But we do point out that he acknowledges that: (1) "[t]here was overwhelming evidence that [he] was the assailant"; (2) he gave two very detailed voluntary confessions that he acknowledges were

(continued...)

appeals from the denial of relief with respect to his first degree murder conviction and the Commonwealth respondents cross-appeal from the granting of relief from the imposition of the death penalty.

In view of the foregoing opinions we need not repeat the background of the case at great length. Rather, it is sufficient to note that after the District Court entered its order Holland appealed, and, on his application, we granted a certificate of appealability raising the following questions:

> whether: the District Court erred in finding various of [Holland's] claims procedurally defaulted; [Holland] was denied his right of an expert at the guilt phase; the sentencing court's instructions violated *Mills* [*v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860

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[1](...continued)
not "false"; and (3) "there was strong evidence of his presence at the scene of the offense and consciousness of guilt." Appellant's br. at 2. Moreover, he recognizes that "[g]iven the overwhelming evidence that [he] was the assailant . . . [his] 'mental condition was his only viable defense' at [the] guilt phase and viable 'mitigation for sentencing purposes.'" *Id.* at 4 (quoting *Holland,* 150 F. Supp. 2d at 755-56). In the circumstances, even though Holland challenges aspects of both phases of the state proceedings, it is not surprising that the most substantial issue on this appeal concerns the imposition of the death penalty on the first degree murder conviction.

> (1988),] and improperly told the jury to count rather than weigh aggravating and mitigating factors; the prosecutors improperly commented on [Holland's] silence at sentencing; and [ ] counsel was ineffective at the guilt and penalty phase [of the state trial court's proceedings].

App. at 99. The Commonwealth respondents did not need a certificate of appealability to proceed with their appeal. *See Hardcastle v. Horn,* 368 F.3d 246, 253 (3d Cir. 2004).

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. §§ 2241(a) and 2254(a) and we have jurisdiction under 28 U.S.C. §§ 1291 and 2253. *See Washington v. Sobina,* 509 F.3d 613, 618-19 (3d Cir. 2007). Inasmuch as the District Court did not conduct an evidentiary hearing our review of its order is plenary. *See Jacobs v. Horn,* 395 F.3d 92, 99 (3d Cir. 2005). The District Court used the applicable standards of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, and thus we need not make further reference to those standards.

III. DISCUSSION

(a) *Procedural Default and Exhaustion of Remedies*

After our review of the parties' thorough briefs and entertainment of their oral arguments we are in agreement with the result that the District Court reached and largely, though not entirely, are in agreement with its reasoning. Therefore we will affirm the District Court's order granting habeas corpus relief from the imposition of the death penalty but otherwise denying Holland relief for substantially the reasons that it set forth. We, however, disagree with the District Court's disposition of a procedural default question principally concerning the treatment of a claim that Holland advances under *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087 (1985). *Ake* addressed the need for the availability to a defendant of a psychiatrist to whom he will have access if his sanity will be a significant factor at the trial. The District Court held that Holland procedurally defaulted his *Ake* claim but that his appellate attorney was ineffective for not raising an *Ake* issue on direct appeal and that Holland satisfied the cause and actual prejudice standard permitting him to raise the *Ake* claim even though it was procedurally defaulted.

In *Bronshtein v. Horn* we explained that "[t]he procedural default doctrine precludes a federal habeas court from 'review[ing] a question of federal law decided by a state court if the decision of that court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" 404 F.3d 700, 707 (3d Cir. 2005) (quoting *Coleman v. Thompson,* 501 U.S. 722, 729, 111 S.Ct. 2546, 2553-54 (1991)). But adequacy with respect to procedural default is not synonymous with, though it may be related to, the opportunity of a petitioner to have asserted his claims in the state court. Rather, explaining adequacy negatively, we indicated in *Bronshtein* that "state procedural rules have been held to be inadequate if they are not 'firmly established and regularly followed' or if they are 'novel[ ]' and unforeseeable." *Id.* (quoting *Ford v. Georgia,* 498 U.S. 411, 424, 111 S.Ct. 850, 858 (1991), and *NAACP v. Alabama ex. rel. Patterson,* 357 U.S. 449, 457, 78 S.Ct. 1163, 1169 (1958)) (alteration in original) (citations omitted). Thus, as we indicated in *Cabrera v. Barbo,* before we decided *Bronshtein,* "a petitioner should be on notice of how to present his claims in the state courts if his failure to present them is to bar him from advancing them in a federal court." 175 F.3d 307, 313 (3d Cir. 1999).

The application of the procedural default doctrine works in tandem with the requirement that a petitioner exhaust his remedies in the state courts before making his federal claims in a federal court. Usually when a petitioner exhausts his remedies in the state courts and then files a federal habeas corpus petition the state courts will have rejected his federal claims on the merits. Nevertheless, a petitioner will have exhausted his state remedies even if the state court does not address his federal claims on the merits but, instead, rejects the claims on an independent and adequate state ground. *See Cabrera,* 175 F.3d at 312-13. If that happens the petitioner ordinarily will not obtain a decision by any court, federal or state, addressing his federal claims on the merits.

But there are limitations on when a procedural default can close the federal door to a petitioner for if a procedurally defaulted petitioner is able to "demonstrate cause for the default and actual prejudice as a result of the violation of federal law" he can obtain a federal court decision addressing his federal claims on the merits. *Coleman,* 501 U.S. at 750, 111 S.Ct. at 2565. A petitioner can establish cause for avoiding the procedural default bar when he demonstrates, among other possible showings, that, as the District Court held was the case here, "the procedural default is the result of ineffective assistance of counsel . . . ." *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986). But even if a petitioner establishes cause for the procedural default, the showing that he must make to obtain relief that he suffered actual prejudice attributable to the ineffective assistance of counsel requires that the error of which he complains "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United*

States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596 (1982).

The District Court found that Holland defaulted certain of his claims, including his *Ake* claim, at the guilt phase of the proceedings, but also held that all of his claims relating to the guilt phase of the proceedings, defaulted or not, were meritless. We agree that all of Holland's guilt phase claims are meritless and, except for the *Ake* claim, we find no reason to comment on them as we cannot add to the District Court's painstaking analysis of those claims. Thus, we will not disturb the state court proceedings by granting Holland relief from his custody on the basis of his assertion that there was constitutional error at the guilt portion of his trial.

The District Court, however, did grant Holland relief under *Ake* from the imposition of the death penalty at the penalty phase of the proceedings. The Supreme Court held in *Ake* that due process of law requires "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83, 105 S.Ct. at 1096. Moreover, under *Ake* this right requires that he has a competent psychiatrist available to assist him both at the guilt and sentencing phases of the state court proceedings. *Id.* at 84, 105 S.Ct. at 1097. Thus, we have explained that, under *Ake,*"when a capital defendant demonstrates that his mental condition is a *significant factor* at his sentencing phase, he is entitled to the assistance of a psychiatrist . . . ." *United States v. Roman,* 121 F.3d 136, 144 (3d Cir. 1997) (internal quotation marks omitted).

Notwithstanding *Ake,* Holland's attorney before his trial did not seek an *Ake* appointment even though the Supreme Court decided *Ake* about four months before the trial. Nevertheless, the trial court, before both the guilt phase of the trial and the Supreme Court's opinion in *Ake,* with Holland's acquiescence appointed an impartial psychiatrist for the case. But the appointment of the impartial psychiatrist did not satisfy the *Ake* standard. Later, however, as the District Court explained, Holland filed an unsuccessful state "post-trial motion arguing that, under *Ake,* he was entitled to the benefit of a presentence report, psychiatric and a medical stud[y] during the penalty phase." *Holland,* 150 F. Supp. 2d at 746 (internal quotation marks omitted).

The District Court believed that Holland's *Ake* claim was procedurally defaulted with respect to both the guilt and penalty phases of the trial because, notwithstanding his post-trial motion seeking an *Ake* appointment, he did not raise a claim in the state courts that the absence of an *Ake* appointment denied him due process of law. It was appropriate for the District Court to draw this distinction between Holland seeking the expert's appointment and advancing his due process contention because there is a difference between asking a court to take certain action and asserting that its denial of the request offended constitutional principles. Moreover, by the time Holland filed his habeas corpus petition in this case in the District Court on January 14, 2000, the filing deadline for state court post-conviction relief applications barred him from seeking review of his *Ake* claim in those courts. In this regard 42 Pa. Cons. Stat. Ann. § 9545(b)(1) (West 1998), which was enacted on November 17, 1995, and became effective on January 16, 1996, provides that any petition under the Pennsylvania Post Conviction Relief Act ("PCRA") "shall be filed within one year of the date the judgment becomes final." There was, however, a one-year grace period for cases in which the judgment became final before the effective date of section 9545(b)(1) during which a *first* PCRA petition could be filed. *See Commonwealth v. Peterkin,* 722 A.2d 638, 641 (Pa. 1999).

The District Court held that Holland procedurally defaulted his *Ake* claim on January 16, 1996, when section 9545(b) became effective, by not asserting it in the state courts by that date. The court also observed that Holland could not file a second petition while his first petition was pending.

Holland, 150 F. Supp. 2d at 724. Moreover, inasmuch as Holland's convictions became final on August 15, 1988, under section 9545(b)(1) Holland had until August 15, 1989, to file a second PCRA petition including his *Ake* claim, as the one-year grace period starting January 16, 1996, applied only to *first* petitions, and Holland could not meet the August 15, 1989 deadline.[2] Holland, as the District Court explained his contentions, argued in the District Court that, in light of when his convictions became final and when a section 9545(b) petition had to be filed, "[t]his set of circumstances . . . did not present sufficient notice to satisfy the adequate and independent state ground requirement of the procedural default doctrine." *Holland*, 150 F. Supp. 2d at 722.

Respondents answered that Holland could have advanced his *Ake* constitutional claim in the state courts by amending his state court post-conviction relief petition when the Legislature adopted section 9545(b)(1) to include his omitted and altered claims during the two-month window of opportunity between the enactment of section 9545(b) and its effective date. *Holland,* 150 F. Supp. 2d at 723. Thus, in their view, the time limits on a second PCRA petition did not matter as Holland could have asserted his constitutional claims in an amended first petition. The history of the case shows that respondents' argument chronologically was correct because: (1) Holland filed his state court post-conviction relief petition on October 6, 1994; (2) the petition was pending in the state PCRA court when the Legislature enacted section 9545(b) on November 17, 1995, and when that section became effective on January 16, 1996; (3) the PCRA trial court rejected the petition on September 16, 1996; and (4) it was pending on appeal until April 1, 1999, when the Pennsylvania Supreme Court affirmed the September 16, 1996 order rejecting the petition. *Id.* at 713. The District Court accepted respondents' argument, noting that Holland's post-conviction relief proceeding was "underway in state court during the sixty-day window of opportunity between the enactment and effective date of § 9545(b) . . . thereby making it relatively easy for [Holland] to amend his petition within the statutory restrictions." *Id.* at 724-25. Thus, the District Court found that Holland "had adequate opportunity to include his claims in his . . . petition for state collateral relief." *Id.* at 725.

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[2] We do not consider the possibility that there may have been earlier time limitations on post-conviction relief applications in Pennsylvania for until the Supreme Court of Pennsylvania rejected the relaxed waiver rule in *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), after the adoption of section 9545(b)(1), a subject and case that we discuss below, any such limitations would not have precluded Holland from seeking post-conviction relief in this capital punishment case.

The parties continue to disagree as to when Holland procedurally defaulted his opportunity to bring his *Ake* claim in the state courts – Holland contending that the date was August 15, 1989, one year after his conviction became final when the Supreme Court of the United States denied certiorari on his direct appeal from his convictions, thus implicitly taking the position that he had to assert the claim in a second PCRA petition, and respondents contending, as the District Court held, that Holland procedurally defaulted his unasserted claims when the section 9545(b)(1) time limitations became effective on January 16, 1996. We, however, need not linger on this point for, as we already have indicated, a petitioner will not default a claim in the state courts unless he does not follow a procedure that, as we explained in *Bronshtein,* is "firmly established and regularly followed."[3] 404 F.3d at 707.

It is clear there was not a firmly established and regularly followed Pennsylvania procedure governing the presentation of claims for relief from death sentences, even after section 9545(b) became effective on January 16, 1996, and, for reasons that we will explain, for more than 34 months thereafter which Holland should have understood as requiring him to bring his claim in the state courts within that 34-month period. Thus, even if Holland could have amended his PCRA proceeding to include an *Ake* claim by January 16, 1996, when section 9545(b) became effective, the availability of that opportunity did not mean that his failure to do so would have required a federal court to hold that if he brought this claim later and the Pennsylvania courts rejected it as untimely under section 9545 (b)(1) the rejection would have been based on an independent and adequate state ground. After all, in *Bronshtein* we explained that even though section 9545(b) took effect on January 16, 1996, and "appears on its face to impose a one-year deadline in all cases except those falling within three categories (none of which is applicable here) . . . strict enforcement of the provision did not begin immediately." 404 F.3d at 708.[4]

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[3] It is appropriate for us to note that although we have the benefit of *Bronshtein* the District Court was not so fortunate as we decided *Bronshtein* after it decided *Holland*.

We explained in *Bronshtein* that starting with *Commonwealth v. McKenna*, 383 A.2d 174 (Pa. 1978), the Supreme Court of Pennsylvania applied a "relaxed waiver rule" that a defendant did not waive a claim of constitutional error in a capital case by failing to preserve it. 404 F.3d at 708. The Supreme Court of Pennsylvania adhered to *McKenna* until November 23, 1998, when in *Commonwealth v. Albrecht*, more than 34 months after section 9545(b) became effective, it rejected the relaxed waiver rule which it acknowledged

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[4] None of the three exceptions to the one-year deadline is present here either.

"virtually [had] eliminated any semblance of finality in capital cases . . . ." 720 A.2d 693, 700 (Pa. 1998). In *Albrecht* the court stated that "[t]he post-conviction appellate stage is an appropriate time to enforce the rules of waiver." *Id.* Then, one month later on December 21, 1998, that court in *Peterkin,* 722 A.2d 638, held that the section 9545(b)(1) one-year time bar applies to capital cases and the relaxed waiver rule did not supercede it. Finally, on March 2, 1999, the court in *Commonwealth v. Banks,* 726 A.2d 374, 376 (Pa. 1999), held that the section 9545(b)(1) time limit is jurisdictional and not subject to judicial relaxation.

As we explained above, aside from the now expired one-year grace period, section 9545(b)(1) requires a petitioner to file his PCRA petition within one-year of his conviction becoming final. Bronshtein's conviction became final on October 20, 1997, when the Supreme Court of the United States denied certiorari on his direct appeal from his conviction. Thus, Bronshtein was required to file his PCRA petition by October 20, 1998, so that it would not be time-barred. Nevertheless, inasmuch as the Supreme Court of Pennsylvania did not decide *Albrecht* until November 23, 1998, we held that Bronshtein did not default his federal claims even though he filed his state court PCRA petition on June 9, 1999, more than one year after his conviction became final, and after the state courts rejected it as untimely under section 9545 (b)(1). *See Commonwealth v. Bronshtein,* 752 A.2d

868 (Pa. 2000). We reached our result because the state procedural rule requiring a PCRA filing within one year of a judgment becoming final "was not firmly established and regularly followed at the time in question," i.e., October 20, 1998, when the time for Bronshtein's PCRA petition under section 9545(b) expired. *Bronshtein,* 404 F.3d at 709.[5] It therefore followed that the state court grounds for rejecting Bronshtein's claims could not be an adequate basis for rejecting his claims under the procedural default doctrine.[6]

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[5] As we pointed out in *Bronshtein* it is possible that the unavailability of judicially created exceptions to the section 9545(b)(1) time limit did not become perfectly clear until the Supreme Court decided *Banks* on March 2, 1999, but that delay did not matter "because Bronshtein's one-year deadline expired before the earliest of the" opinions in *Albrecht, Peterkin,* and *Banks. Bronshtein,* 404 F.3d at 709.

[6] Bronshtein's June 9, 1999 petition was the second PCRA petition filed on his behalf. On December 3, 1997, the Center for Legal Education, Advocacy and Defense Assistance filed a timely PCRA petition naming Bronshtein as the petitioner but at his request the state PCRA court dismissed the petition on January 26, 1999, and on appeal from that dismissal the Supreme Court upheld the dismissal on April 16, 1999. *Commonwealth v. Bronshtein,* 729 A.2d 1102, 1108 (Pa. 1999). Accordingly, the proceedings on the December 3, 1997 petition were pending in the PCRA court when the Supreme Court decided *Albrecht* and *Peterkin.* Thus, Bronshtein had an opportunity after the Supreme Court decided *Albrecht* and *Peterkin* to pursue the timely December 3, 1997 petition brought less than two months after his conviction

(continued...)

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[6](...continued)
became final and to seek to amend it to include any omitted claims. Instead, he successfully sought to have the petition dismissed. Nevertheless, we held that Bronshtein's habeas corpus petition was not barred on an independent and adequate state ground even though it should have been evident to Bronshtein after the Supreme Court decided *Albrecht* and *Peterkin* that by seeking the dismissal of the December 3, 1997 petition, in light of those two cases and section 9545 (b)(1) he was risking losing his opportunity to bring timely claims at the time when state law compelled him to bring them.

It is the circumstance that the December 3, 1997 PCRA petition likely could have been amended after the Supreme Court decided *Albrecht* on November 23, 1998, and *Peterkin* on December 21, 1998, before the PCRA court dismissed the petition on January 26, 1999, to include the federal claims that makes that petition significant. After all, during the time that this first state petition was pending Bronshtein, in the language of *Cabrera,* surely was "on notice of how to present his claims in the state courts . . ." and almost certainly could have done so. 175 F.3d at 313. Therefore, we conceivably could have held in *Bronshtein* that the Supreme Court decision in *Bronshtein,* 752 A.2d 868, rejecting Bronshtein's June 9, 1999 PCRA petition as untimely after the Supreme Court decided *Albrecht* and *Peterkin* was predicated on an adequate state ground even though the court decided those two cases more than one year after Bronshtein's conviction became final. Nevertheless, we did not do so as we instead reached our result that Bronshtein did not procedurally default his federal claims because the Supreme Court did not decide *Albrecht* until more than one year after Bronshtein's conviction became final and his section

(continued...)

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[6](...continued)
9545(b)(1) filing period had expired.

We recognize that we did not seem to consider the possible effect of the December 3, 1997 petition when we concluded that Bronshtein did not default his federal claims, though we were well aware of it. But we still think that we should not deviate from what we did in *Bronshtein* and now reach the opposite result on the theory that Holland might have been able to amend his petition after *Albrecht* and *Peterkin* and, on that basis, hold here that the Pennsylvania courts dismissed Holland's claims on adequate state grounds under the procedural default doctrine. Inasmuch as the PCRA court dismissed Holland's PCRA petition on the merits on September 16, 1996, before the Supreme Court decided *Albrecht,* Holland could have amended his petition in response to *Albrecht* only on a remand from the Supreme Court to the PCRA court pursuant to Pa. R. App. P. 123 and 2501 so that he could have sought to file the amendment in that court. *See Commonwealth v. Abu-Jamal,* 833 A.2d 719, 722 n. 1 (Pa. 2003). In adhering to the *Bronshtein* approach, we recognize that if Holland had been able to amend his petition after *Albrecht* the amendment would have related back to when he filed his petition on October 6, 1994. *See* Pa.R.Crim.P. 905(a); *Commonwealth v. Flanagan,* 854 A.2d 489, 499-500 (Pa. 2004); *Commonwealth v. Padden,* 783 A.2d 299, 308-09 (Pa. Super. Ct. 2001) (permitting petitioner to amend his timely petition to include new claims that were not raised within one year of petitioner's judgment of sentence becoming final). Rather, we follow the *Bronshtein* approach notwithstanding the possibility that Holland could have amended his PCRA petition after *Albrecht,* because we cannot distinguish in considering whether the state courts rejected the petitioner's claims on adequate state grounds

(continued...)

It might be thought that in our case inasmuch as Holland's convictions became final many years before the petitioner's conviction in *Bronshtein* became final the inadequacy of Holland's state court remedies is even more apparent than the inadequacy of the petitioner's remedies in *Bronshtein*. Moreover, as we noted in *Bronshtein*, 404 F.3d at 709-10, the Supreme Court of Pennsylvania did not adopt a transitional rule preserving claims from extinction after it abolished the relaxed waiver rule in *Albrecht* and thus Holland, like Bronshtein, did not have the advantage of a grace period to file his PCRA petition after the court released its opinion in *Albrecht*.[7] But because

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[6](...continued)
between Holland's timely October 6, 1994 petition filed before the enactment of section 9545(b) which was pending at the time of the section's enactment and the timely section 9545(b) petition filed on Bronshtein's behalf after the enactment of section 9545(b). In any event, the possibility that Holland might have been able to secure a remand of his PCRA appeal to the PCRA court and then secure an amendment of his petition in that court surely does not somehow mean that the PCRA court when it dismissed Holland's petition before *Albrecht* acted on the basis of firmly established and regularly followed state grounds.

[7] In a similar situation Pennsylvania provided with respect to first PCRA petitions in cases of final judgments before the effective date of section 9545(b)(1) that a petition filed within one year of the effective date is deemed timely.

(continued...)

Holland, unlike Bronshtein, filed his PCRA petition before the adoption of the section 9545(b)(1) time limitation and his petition was pending in the PCRA trial court both when the Legislature adopted that section and when it became effective two months later, there is a circumstance here from which it could be concluded that Holland received notice to advance his constitutional claims in a timely way that Bronshtein did not have so that we should reach a different result here than that we reached in *Bronshtein.*[8]

The District Court believed that the circumstance that Holland's PCRA petition was pending in the PCRA court when section 9545(b)(1) was enacted and became effective was particularly important because of a colloquy at a PCRA hearing on December 14, 1995, held after the Legislature enacted section 9545(b) but before it became effective, i.e., during the period of the window of

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[7](...continued)
See Peterkin, 722 A.2d at 641. Likewise, in a comparable situation we, along with other courts of appeals, adopted a transitional rule when Congress enacted the AEDPA in 1996 so as to preserve claims from immediate extinction by the statute's time rules during a one-year grace period after its enactment. *See, e.g., McAleese v. Brennan*, 483 F.3d 206, 212 (3d Cir. 2007).

[8] Even the December 3, 1997 PCRA petition filed on Bronshtein's behalf was filed after the effective date of section 9545(b). *See supra* note 6.

opportunity to file a PCRA petition. The District Court indicated that at the hearing the PCRA court brought the need for Holland to assert his federal claims at that time to his attention. Thus, the District Court explained that "the trial court [in the PCRA proceedings] brought this issue squarely to [Holland's] attention when [the court] asked [Holland] during his initial PCRA hearings if he had anything else he would like to present and explained to [him] that this opportunity may be [Holland's] last to raise further issues in a collateral proceeding." *Holland,* 150 F. Supp. 2d at 725. The District Court then stated that "[t]his warning was couched in terms which any lay person could not fail to understand." *Id.* We, however, have examined the PCRA proceedings and disagree with the District Court's understanding of them. In the PCRA proceedings Holland rejected his attorney's advice to testify and, instead, voluntarily decided not to do so. At that point the PCRA court told him that "I certainly can't force you to get on the stand, or force you to testify, even though it is probably to your benefit to do so." App. at 1170. Holland answered the court by saying "You're right" to which the court responded "You understand that this very well may be your very last opportunity in life to do that?" *Id.* We think that, contrary to what the District Court believed, this colloquy did not caution Holland that at that time he may have had his last opportunity "to raise further issues in a collateral proceeding." *Holland,* 150 F. Supp. 2d at 725. In fact, the PCRA court in the colloquy did not even mention the already enacted section 9545(b) time limitations. The PCRA court merely told Holland that at that moment he might have his last chance to testify, a warning that surely would have been understood to relate to Holland's pending claims which did not include an *Ake* due process of law constitutional claim.

In the circumstances this case is distinguishable from *Cabrera,* a case arising from New Jersey in which on direct appeal following a conviction the Appellate Division of the Superior Court remanded the case to the trial court to give the defendant an opportunity to withdraw his guilty plea. In remanding the case the Appellate Division provided that in the remand proceedings there could be "such further action as the parties and court find appropriate." *Cabrera,* 175 F.3d at 308-09 (quotation marks omitted). On the remand the trial court asked Cabrera, who later became the federal court petitioner, if there was anything else he wanted to say but Cabrera declined the opportunity to do so. Accordingly, it was clear that the state trial court gave Cabrera an opportunity to raise additional issues.

Subsequently, Cabrera filed a petition in the state courts seeking post-conviction relief on the ground of ineffectiveness of counsel. Although ordinarily in New Jersey a defendant need not raise an ineffectiveness claim on direct appeal, the court in the post-conviction relief proceeding rejected the claim on the ground that Cabrera passed up his opportunity to raise the claim on the remand following his direct appeal. In Cabrera's subsequent habeas corpus proceedings we found his ineffectiveness claim to be procedurally defaulted for the same reason. In reaching our conclusion we pointed out that Cabrera was represented by a new attorney on the remand in place of the allegedly ineffective attorney, the state trial court on the remand asked Cabrera if there was "anything" he wanted to raise, and "Cabrera and his attorney did not have to rely on an intricate analysis of state law to determine whether they could advance the ineffective assistance of counsel claims at the remand hearing . . . as [those claims] certainly came within the wide open category of 'anything.'" *Cabrera,* 175 F.3d at 313.

But *Holland* is not *Cabrera*. Cabrera was given an opportunity to raise "anything," not merely to testify. Moreover, in *Cabrera* the ineffective assistance of counsel claim was related directly to Cabrera's application to withdraw his guilty plea. Thus, though respondents in these proceedings correctly quote *Cabrera* for the point that "a petitioner should be on notice of how to present his claims in the state courts if his failure to present them is to bar him from advancing them in a federal court,"*Cabrera,* 175 F.3d at 313, the inference they draw from this language, i.e. that the PCRA trial court's warnings to Holland concerning his opportunity to testify was sufficient notice, is unjustified. *See* Appellees' rep. br. at 22.

In any event, even if the PCRA trial court explicitly had warned Holland on December 14, 1995, that he had to raise all of his possible issues and made it clear that it would permit him to do so we could not conclude that Holland's unasserted federal claims were procedurally barred. The opportunity to raise issues would not have been a mandate to do so for, as we indicated above, when the state PCRA court gave its warnings on December 14, 1995, the Pennsylvania Supreme Court had not yet rejected the relaxed waiver rule as it did not decide *Albrecht* until November 23, 1998. Thus, at the time of the trial court PCRA proceedings on December 14, 1995, a definitive warning that issues unless raised then would have been abandoned in the state courts would have been misleading. In sum, therefore, we conclude that the procedural default doctrine did not preclude Holland from presenting any of his federal claims in the District Court or from doing so here.

(b) *The Disposition of this Appeal*

Where then does our conclusion that none of Holland's claims are procedurally defaulted take us? Actually we arrive at the same place as the District Court, the denial of relief with respect to the guilt phase of the proceedings and the grant of relief with respect to the penalty phase. Thus, we will affirm the order of the District Court reaching that result in all respects.

We will reverse the logical order of discussion and address the penalty phase of Holland's trial first. As we have explained, the District Court concluded that Holland's *Ake* claim was procedurally defaulted but it excused the default through application of the cause and prejudice doctrine that became implicated in the case by reason of the ineffectiveness of his attorney in failing to raise the *Ake* issue on direct appeal. The District Court then granted relief that would permit but not compel a new penalty trial at which the Commonwealth again could seek the death penalty. Certainly if the District Court was correct that even assuming that Holland procedurally defaulted the claim he was entitled to a new penalty proceeding based on the merits of his assertions under *Ake,* it would have held that in the absence of the procedural default he would have been entitled to such relief. In any event, exercising plenary review, we conclude that Holland is entitled to penalty phase relief on the *Ake* claim essentially for the reasons the District Court stated. Our conclusion renders Holland's remaining penalty phase arguments moot as he can receive no relief beyond that which he is receiving with respect to the penalty as we cannot discern any reason why if we accepted any of these arguments the Commonwealth would be precluded from seeking the death penalty at a new penalty proceeding.

With respect to the guilt phase we first deal with *Ake*. The District Court found that Holland's *Ake* claim was procedurally barred and that the procedural default could not be excused so as to allow him to assert his guilt phase *Ake* claims in the habeas corpus proceeding because Holland did not demonstrate that he suffered actual prejudice at the guilt phase of the trial by reason of the absence of an *Ake* expert. Thus, though we reject the District Court's procedural default conclusion because we hold that the state procedures and proceedings on which it relied on are not adequate to bar his *Ake* claim, still Holland cannot obtain relief under *Ake* from the guilt phase of the trial unless the state trial court prejudiced him by not making a pretrial *Ake* appointment. Of course, we only could reach that conclusion by rejecting the District Court's conclusions on the prejudice issue. In considering this issue it is important in this regard to recognize that Holland's *Ake* claim is tenable only when combined with his ineffective assistance of counsel claim with respect to the guilt phase of the trial as Holland did not make a motion seeking an *Ake* appointment until after the trial. Holland seems to recognize this point for in his brief he meshes his *Ake* and ineffective assistance of counsel claims with the following explanation:

> For these reasons, and as the District Court found, the due process right to proper expert assistance and the Sixth Amendment right to effective

> assistance of counsel were violated when the court failed to appoint a defense expert, counsel failed to demand a defense expert, the neutral expert did not address any of [Holland's] potential mental health defenses at guilt – or penalty – phase, and counsel made no effort to ascertain what mental health defenses . . . would be reasonably available.

Appellant's br. at 49 (internal quotation marks omitted). Moreover, in his brief Holland explains that before his trial his attorney filed a notice of mental infirmity defense and successfully moved for a court-appointed psychiatrist and, rather than seeking a defense expert, accepted the appointment of an "independent" "neutral" psychiatrist. *Id.*

Under *Strickland v. Washington* a petitioner claiming relief on the basis of ineffective assistance of counsel must show that his counsel's representation of him fell below an objective standard of reasonableness and that the deficient performance prejudiced his defense. 466 U.S. 668, 688, 693, 104 S.Ct. 2052, 2064, 2067 (1984). To establish that there had been prejudice a petitioner must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. A reasonable probability is "sufficient to undermine confidence in the outcome." *Id.* As the District Court observed, "[t]he prejudice standard applied in the ineffective assistance context is nearly identical to the actual prejudice standard for excusing a procedural default articulated in *Coleman*." *Holland,* 150 F. Supp. 2d at 727. Consequently, the District Court concluded that it could "rely on any findings of prejudice within [its] ineffectiveness inquiry to satisfy any claims of actual prejudice to [Holland in a cause and effect inquiry]." *Id.*

Overall, again exercising plenary review, we are convinced that Holland was not prejudiced at the guilt phase of the trial by the absence of an *Ake* mental health expert appointment and that even if the state trial court had made that appointment the result at the guilt phase of the trial surely would not have been different. Thus, Holland cannot obtain relief by a combination of ineffective assistance of counsel and *Ake* claims.

Furthermore, even if we eliminate the need for Holland to make an ineffective assistance of counsel showing to support his *Ake* claim our result would not be different. To start with, as the District Court pointed out, Holland did not "request[ ] [an *Ake*] defense expert during the guilt phase of his state murder trial [and] [h]is post-trial motion argued only that he needed a court-appointed mental health expert for assistance in developing mitigation evidence at the penalty phase." *Holland,* 150 F. Supp. 2d at 755. Consequently, the court held that he did not have a "remedial claim" by reason of the lack of that appointment and he is not "entitled to it under the circumstances." *Id.* We agree as the trial court made the appointment that Holland sought, an impartial psychiatrist, and to use Holland's own word, "accepted." Appellant's br. at 4. *See Clisby v. Jones,* 960 F.2d 925, 934 n. 12 (11th Cir. 1992) ("We have held that *Ake* does not impose upon the trial court a duty *sua sponte* to appoint a psychiatrist."). Moreover, just as we are satisfied that for purposes of an ineffective assistance of counsel claim Holland was not prejudiced at the guilt phase of the trial by the absence of an *Ake* appointment, we are satisfied that for due process of law purposes the absence of such an appointment did not prejudice Holland.

The final matter that we must consider is the effect of our conclusion that Holland's federal claims arising from the guilt phase of his trial beyond his *Ake* claim, even if not raised in the state courts, were not procedurally barred. As we indicated at the outset of this opinion, we conclude that all of these claims, as well as the claims that Holland did raise, are without merit to the end that he is not entitled to relief on the basis of those claims separately or in conjunction with each other.

IV. CONCLUSION

For the foregoing reasons we will affirm the order of April 25, 2001.

(EXCERPT)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM HOLLAND,)
)
Petitioner,) **CIVIL ACTION**
)
v.)
) **No. 99-CV-2551**
MARTIN HORN, Commis-)
sioner, Pennsylvania)
Department of Correc-) **Capital Case**
tions; PHILIP L. JOHNSON,)
Superintendent of the State)
Correctional Institution,)
Greene County; and)
JOSEPH P. MAZURKIE-)
WICZ, Superintendent of)
the State Correctional)
Institution at Rockview,)
)
Respondents)

OPINION AND ORDER

Van Antwerpen, J. Filed: April 25th, 2001

I. INTRODUCTION

This matter is before us pursuant to a Petition for a Writ of Habeas Corpus, filed by petitioner William Holland ("Petitioner") on January 14, 2000. Petitioner presents twelve claims in pursuit of relief from his state murder conviction and death sentence under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. Petitioner was arrested on August 14, 1984 and charged with burglary, robbery, attempted rape, attempted involuntary deviate sexual intercourse, and first degree murder arising from an incident in the home of Jewel Stevens ("Victim") on August 11, 1984. Alli B. Majeed, Esq. ("trial counsel") was appointed by the court to assist Petitioner in presenting his defense. Petitioner was found guilty by a jury on all charges in the Court of Common Pleas, First Judicial District of Pennsylvania, Trial Division, on June 12, 1985. The same jury fixed the penalty at death later that day in a bifurcated proceeding. Petitioner filed a timely appeal to the Pennsylvania Supreme Court, which was denied on May 20, 1988. *See Commonwealth v. Holland ("Holland I"),* 543 A.2d 1068 (1988). He was represented on direct appeal by Norris E. Gelman, Esq. ("appellate counsel").

On October 6, 1994, Petitioner filed a *pro se* petition for collateral post-conviction relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 *et seq.* On

October 7, 1985, the PCRA court entered an order staying Petitioner's execution for ninety days, pending the filing of a counseled PCRA petition. Barnaby C. Wittles, Esq. ("PCRA counsel") was appointed to represent Petitioner in his post-conviction proceedings. Three evidentiary hearings were held in conjunction with Petitioner's claims for state post-conviction relief. The first was held on July 13, 1995, the second on December 14, 1995, and the third on May 22, 1996. Petitioner's post-conviction claims were denied in the Court of Common Pleas of Philadelphia County, Criminal Trial Division, on September 16, 1996. Petitioner then filed a timely appeal to the Pennsylvania Supreme Court, which was denied on April 1, 1999.[1] *See Commonwealth v. Holland ("Holland II"),* 727 A.2d 563 (1999).

This case comes before us under § 2254 of the AEDPA, which permits federal courts to grant, under certain circumstances, a writ of habeas corpus to prisoners convicted in state court. Petitioner filed his Petition for a Writ of Habeas Corpus in this Court on January 14, 2000. His Petition was followed by a Memorandum of Law in Support of Petition for a Writ of Habeas Corpus on April 28 of that year. The Commonwealth submitted its

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[1] Petitioner filed briefs in support of both his appeals to the Pennsylvania Supreme Court. (*See* Br. Appellant 3/6/87 ("Holland I Brief"); Br. Appellant 6/13/97 ("Holland II Brief").)

Response to Petition for Writ of Habeas Corpus on November 15, 2000, to which Petitioner responded on March 12, 2001 with Petitioner's Reply Brief in Support of His Petition for Writ of Habeas Corpus. All papers were timely filed and have been considered herein. We have placed the burden of proof on Petitioner to establish by a preponderance of the evidence any or all of the twelve claims included in his Petition, and find that he has satisfied this burden with respect to one of his claims. We therefore vacate Petitioner's death sentence and remand his case to the Pennsylvania courts with an order that there be a resentencing.

II. BACKGROUND

In the early morning hours of August 11, 1984, Petitioner entered the basement apartment of Jewel Stevens at 7829 Langdon Street in Northeast Philadelphia by cutting a screen and climbing through the window. (*See* N.T. 6/5/85, at 1.70-1.71.) Ms. Stevens, who was seventy-one years old, was asleep. After cutting the phone line, Petitioner proceeded to stab Ms. Stevens in her side and abdomen with an onion peeler. (*See* N.T. 6/6/85, at 2.67.) She suffered a deep laceration on her right arm in an attempt to defend herself. (*See* N.T. 6/10/85, at 4.35.) Petitioner then forcefully removed Ms. Stevens' pajama bottoms, used them to tie her wrists together, and sexually assaulted her. (*See* N.T. 6/6/85, at 2.67-2.68.) He stuck Ms. Stevens' toes with straight pins, leaving one in her right foot. (*See* N.T. 6/6/85, at 2.4.) He took a few dollars from a table in the apartment and smoked a cigarette. (*See* N.T. 6/6/85, at 2.57, 2.68.)

At approximately 5 a.m., Betty Roman, Ms. Stevens' upstairs neighbor, was awakened by noises in Ms. Stevens' apartment, including the Victim's cries for help. Ms. Roman called the police. (*See* N.T. 6/5/85, at 1.44-1.49.) When he became aware of the police's arrival, Petitioner hid the bloody onion peeler above a neighbor's door and fled the building. (*See* N.T. 6/5/85, at 1.60-1.62.) Officer Randall Straw arrived on the scene first and tended to Ms. Stevens in her apartment. Officer Bridgette McGinnis arrived after Officer Straw, and proceeded to the back of the Ms. Stevens' apartment building, where she observed Petitioner for about twenty seconds before he fled. (*See* N.T. 6/5/85, at 1.101-1.110.) The next evening, Officer Mitsos, a member of the Sex Crimes Unit of the Philadelphia Police Department, received a call from Ms. Susan Dorfman. Ms. Dorfman identified a man named "Bill" who lived in the building behind Ms. Stevens', as the potential perpetrator. At approximately 1:30 a.m., Officer Mitsos went to the building behind Ms. Stevens' in an attempt to ascertain if anyone named Bill lived there. He met Petitioner, who successfully fled Officer Mitsos' pursuit. The building superintendent notified Officer Mitsos that Petitioner lived with there his mother, Ms. Pauline Rogers, and advised the officer that Petitioner may have gone to his grandmother's house. Officer Mitsos was, however, unable to locate Petitioner at his grandmother's house. (*See* N.T. 6/5/85, at 1.140-1.150.)

Two days later, on August 14, 1984, Officer Dennis Graeber, Petitioner's half-brother, informed Detective Joseph Descher that Petitioner was currently at his grandmother's house. Detective Descher proceeded to that location, where he found Petitioner and his grandmother. Detective Descher asked Petitioner to accompany him to the police station for questioning, making clear to Petitioner that he was under no legal obligation to do so. Petitioner agreed. (*See* N.T. 6/6/85, at 2.25-2.33.) When they arrived at the station, Officer Descher and his partner, Officer Schol, began to question Petitioner about the incident at Ms. Stevens' apartment. When Petitioner made it clear that he was in Ms. Stevens' apartment on the night of the attack, the officers read Petitioner his *Miranda* rights and recorded his full confession. (*See* N.T. 6/6/85, at 2.40-2.69.) On August 24, 1984, Jewel Stevens died from wounds sustained during the incident on August 11. (*See* N.T. 6/6/85, at 2.9.) Petitioner was charged with, among other things, the first degree murder of Jewel Stevens. He was convicted by a jury and sentenced to death. He has been denied relief from his conviction and sentence both on direct appeal and in state collateral proceedings under the PCRA. He now petitions this court for federal habeas corpus relief pursuant to § 2254 of the AEDPA.

III. DISCUSSION

A. Exhaustion

Before filing a petition for habeas corpus relief under 28 U.S.C. § 2254, a petitioner must exhaust all available state court remedies. 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is a rule of comity, not jurisdiction, *Castille v. Peoples*, 489 U.S. 346, 349 (1989), and is designed to allow state courts the opportunity to correct a state's alleged violation of federal constitutional law before federal courts consider the matter. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

Exhaustion requires that petitioner fairly present his claims to every level of state court, including offering each claim for discretionary review by a State's highest court, and afford each reviewing court a fair opportunity to act on those claims.[2] *O'Sullivan*, 526 U.S. at 845; *Picard v.*

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[2] This requirement is currently being questioned in Pennsylvania with regard to non-capital cases. *See Mattis v. Vaughn*, 128 F.Supp.2d 249, 259 (E.D. Pa.2001) (upholding

(continued...)

Connor, 404 U.S. 270, 275-76 (1971).[3] The petitioner bears the burden of proving that he has exhausted available state remedies. *See Landano v. Rafferty,* 897 F.2d 661, 668 (3d Cir. 1990); *Santana v. Fenton,* 685 F.2d 71, 73 (3d Cir. 1982). The petitioner is not, however, required to revisit claims raised on direct appeal in state collateral proceedings, *see O'Sullivan,* 526 U.S. at 844 (citing

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[2](...continued)
an order by the Pennsylvania Supreme Court making discretionary review by that court "unavailable" for purposes of federal habeas review). The Pennsylvania Supreme Court, however, exercises mandatory review of all death sentences, thereby making the order addressed in *Mattis* inapplicable here.

[3] The Third Circuit has interpreted this standard and established four criteria to determine whether a federal claim is fairly presented when state court pleadings do not refer to specific, appropriate portions of the Constitution:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999) (quoting *Evans v. Court of Common Pleas, Del. County, Pa.,* 959 F.2d 1227, 1232 (3d Cir. 1992)).

Brown v. Allen, 344 U.S. 443, 447 (1953)), or seek alternatives to state habeas such as "a suit for injunction, a writ of prohibition, or mandamus or a declaratory judgment in the state courts." *Id.* (citing *Wilwording v. Swenson,* 404 U.S. 249, 249-50 (1971) (per curiam)). If the petitioner is unable to prove that all claims in his petition satisfy the statutory exhaustion requirements, his entire petition must be dismissed without prejudice and returned to the state courts for consideration of the unexhausted claims. *Rose v. Lundy,* 455 U.S. 509, 522 (1982); *Lines v. Larkins,* 208 F.3d 153, 159-60 (3d Cir. 2000). In the absence of any colorable federal claim, unexhausted claims may be dismissed on their merits. *See Lambert v. Blackwell,* 134 F.3d 506, 515 (3d Cir. 1997) (interpreting 28 U.S.C. § 2254(b)(2): "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

If, however, state procedural rules bar a petitioner from seeking further relief in state courts, "the exhaustion requirement is satisfied because there is 'an absence of available State corrective process.'" *McCandless v. Vaughn,* 172 F.3d 255, 260 (3d Cir. 1999) (citing 28 U.S.C. § 2254(b)); *see also Gray v. Netherland,* 518 U.S. 152, 161-62 (1996) ("Because [the exhaustion] 'requirement . . . refers only to remedies still available at the time of the federal petition,' it is satisfied 'if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law.'" (citations omitted)); *Coleman v. Thompson,* 501 U.S. 722, 732 (1991) ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him.").

The Commonwealth argues that at least eight of Petitioner's twelve claims are not exhausted and are therefore not reviewable in federal court. It alleges that four of these claims, Claims I, II, IV, and VII, have been amended and are now so altered that they are not substantially equivalent to those presented in state court ("altered claims"). It further alleges that four other claims, Claims V, VI, VIII, and IX, were never presented in state proceedings at all ("omitted claims") and therefore remain unexhausted. (*See* Resp. Pet. Writ Habeas Corpus at 25.) We believe Petitioner's claims are exhausted under 28 U.S.C. § 2254 by virtue of their having been either fairly presented in state court or precluded from further state court review by an absence of available process. Petitioner is currently barred from pursuing state habeas review by state law under 42 Pa. C.S.A. § 9545(b)(1), which requires that all state habeas claims be presented within one year of the date that the judgment against Petitioner becomes final. A conviction is deemed final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa. C.S.A. § 9545(b)(3). Because Petitioner's eligibility for certiorari to the United States Supreme Court expired on or about August 20, 1988, *see* 28 U.S.C. § 2101(d); Sup. Ct. R. 11, we find that Petitioner's omitted claims are precluded from state court review under 42 Pa. C.S.A. § 9545(b) and, therefore, that he has satisfied the exhaustion requirement of 28 U.S.C. §§ 2254(b) & (c) due to an "absence of available state corrective process." *McCandless,* 172 F.3d at 260 (citing 28 U.S.C. § 2254(b)).

B. Procedural Default

A federal court may not, however, proceed to the merits of a claim simply because that claim satisfies the exhaustion requirement of 28 U.S.C. § 2254(b)(1)(A) and § 2254(c) because of a lack of available state process. Rather, "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred." *Coleman,* 501 U.S. at 750; *see also Lines v. Larkins,* 208 F.3d 153, 160 (3d Cir. 2000) (quoting *McCandless,* 172 F.3d at 260).

Like exhaustion, the procedural default doctrine is based on principles of comity, and is intended to "reduce[ ] friction between the state and federal court systems by avoiding the 'unseem-

[liness]' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan*, 526 U.S. at 844-45. A claim is procedurally defaulted if the state court of last resort refuses to consider its merits. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available."); *County Court v. Allen*, 442 U.S. 140, 152-53 (1979) (finding that, because the trial court "ruled on the merits" rather than on some state procedural ground, that the court "implicitly decided that there was no procedural default").

We have noted that Petitioner is presenting four omitted claims and four amended claims to this court for review. Respondent argues that all of these challenged claims are procedurally defaulted and therefore precluded from review by this Court. Petitioner, however, presents three arguments in favor of federal review. First, he maintains that these claims were all reviewed on their merits by the Pennsylvania Supreme Court pursuant to 42 Pa. Cons. Stat. § 9711(h)(3)(i). Second, he contends that none of the aforementioned claims can properly be deemed procedurally defaulted because the state procedural rule forbidding court state consideration of them, 42 Pa. Cons. Stat. § 9545(b), is not an adequate and independent state ground barring collateral review. Alternatively, Petitioner argues that he can show cause and prejudice for failing to present the contested issues in state court.[4] We address the first two of these theories below, and find both of them unconvincing. Neither Petitioner's "automatic exhaustion" theory under § 9711(h) nor his claim that § 9545(b) is an inadequate procedural rule forbidding collateral review are consistent with the existing law of this circuit or with the overwhelming majority of federal cases in other circuits.[5]

* * * *

2. *Independent and Adequate Grounds*

If Petitioner's omitted or altered claims were not fairly presented and exhausted in state court, our review of those claims is barred by the doctrine of procedural default if state court review of those claims is precluded by an independent and adequate state procedural rule. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). A state procedural rule is considered independent if it does not rely on the merits of a federal claim or "rest[ ] its decision primarily on federal law." *Harris v. Reed,* 489 U.S. 255, 260-61 (1989); *see also Ford v. Stepanik,* 1998 WL 297626, at *3 (E.D. Pa. June 2, 1998). Such a rule is adequate under the procedural default doctrine if it is "firmly established and regularly followed" within the state. *James v. Kentucky,* 466 U.S. 341, 348 (1984); *see also Ford v. Georgia,* 498 U.S. 411, 423-24 (1991) (stating that a state procedural rule may not be adequate if "the defendant . . . could not be 'deemed to have been apprised of its existence'"); *Johnson v. Mississippi,* 486 U.S. 578, 587 (1988) ("[A] state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Barr v. City of Columbia,* 378 U.S. 146, 149 (1964).). *But see Jamison v. Collins,* 100 F. Supp. 2d 521, 559 (S.D. Ohio 1998) ("A state procedural rule that was not firmly established *at the time it should have been complied with* by the petitioner, and therefore is applied retroactively, is not an adequate state ground that bars federal habeas review."). The phrase "firmly established and regularly followed" requires that a petitioner have some sort of notice, at the time of his state court procedural default, of a state procedural rule's potential impact on his case before that rule can be considered adequate. *See Ford v. Georgia,* 498 U.S. at 423-24; *N.A.A.C.P. v. Alabama,* 357

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[4] Petitioner's cause and prejudice arguments are addressed with respect to each individual claim, *infra* Part III.C.

[5] Regardless of whether some parts of Petitioner's amended claims are not reviewable by this Court, we nonetheless remain obligated to address those arguments that were not procedurally defaulted. *Cf. Rose v. Lundy,* 455 U.S. 509 (1982) (finding that a petition containing both exhausted and unexhausted, as opposed to procedurally defaulted and non-procedurally defaulted, claims must be dismissed from federal court).

U.S. 449, 457 (1958) ("[A] local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures . . . cannot avail the State here, because petitioner could not fairly be deemed to have been appraised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court . . . ."); *Cabrera v. Barbo,* 175 F.3d 307, 313 (3d Cir. 1999) ("The reason for these requirements is that a petitioner should be on notice of how to present his claims in the state courts if his failure to present them is to bar him from advancing them in a federal court."). The Third Circuit found this notice requirement satisfied when a presiding judge in a collateral proceeding specifically asked a petitioner if he had anything else to present. *Cabrera,* 175 F.3d at 313 (finding that petitioner had "ample opportunity" to present his defaulted claims in state court because "the judge at the hearing repeatedly gave Cabrera, who was present at the hearing, an opportunity to say 'anything'").

Petitioner contends that none of his claims are procedurally defaulted because the PCRA's one year filing limit, 42 Pa. Cons. Stat. § 9545(b)(1), which precludes him from currently pursuing his challenged claims in state court, is not an independent and adequate state procedural rule sufficient to foreclose federal post-conviction review. (*See* Mem. Law Supp. Pet. Writ Habeas Corpus at 7-12.) Section 9545(b) was enacted on November 17, 1995, and became effective on January 16, 1996. It states that "[a]ny petition under [the PCRA] . . . shall be filed within one year of the date the judgment becomes final."[10] Section 9545 is clearly an independent state ground for reviewing habeas corpus claims, as it does not rely on federal law for its determination of the availability of state post-conviction review. The parties do not dispute this conclusion.

The question before us, then, is whether § 9545 represents an adequate procedural rule, pursuant to which Petitioner should have sought state post-conviction review of his challenged claims before presenting them for the first time in federal court. More specifically, the debate centers around the notice afforded Petitioner regarding the application of § 9545(b)'s one year time limit for filing state habeas claims. Petitioner argues that § 9545(b)'s filing limit is not an adequate state ground barring adjudication of his claims because it effectively foreclosed his ability to present claims to the state court retroactively; the provision's one year filing limit became effective on January 16, 1996 and immediately barred any claim, according to Petitioner, filed after August 15, 1989, or one year after his state court conviction became final. This set of circumstances, argues Petitioner, did not present sufficient notice to satisfy the adequate and independent state ground requirement of the procedural default doctrine.[11]

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[10] The statute includes three exceptions to the one year filing limit, 42 Pa. Cons. Stat. § 9545(b)(1)(i-iii), but Petitioner admits that none of them apply here. (*See* Mem. Law Supp. Pet. Writ Habeas Corpus at 8.)

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[11] Petitioner also implicitly relies on the Pennsylvania "relaxed waiver" doctrine to demonstrate his lack of notice regarding the preclusive effects of § 9545(b) on his future collateral claims. Under the "relaxed waiver" doctrine, the Pennsylvania Supreme Court reserved its discretion "to address all issues arising in a death penalty case, irrespective of a finding of waiver." *Commonwealth v. Travaglia*, 661 A.2d 352, 356 n.6 (Pa. 1995). Petitioner suggests that the doctrine's existence led him to believe that his state collateral claims would be preserved despite his violation of § 9545(b), and that he therefore was without proper notice of the statute's potentially preclusive effect. Although Petitioner is correct in citing the existence of such a doctrine prior to the PCRA amendments of November 17, 1995, the doctrine appears to have been eradicated by the language of those amendments, which state that "[e]xcept as specifically provided otherwise, all provisions of this subchapter shall apply to *capital* and noncapital cases." 42 Pa. Cons. Stat. § 9542 (emphasis added). The Pennsylvania Supreme Court verified this interpretation in *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998), in which it upheld the constitutionality of the 1995 PCRA amendments against challenges that they could not, in conjunction with the relaxed waiver doctrine, provide reliable notice of the availability of state collateral review. The clear language of the 1995 amendments, in conjunction with the Pennsylvania Supreme Court's ruling that the relaxed waiver doctrine could not trump the statute's authority, leads us to conclude that Petitioner could not have justifiably relied on the relaxed waiver doctrine as grounds for withholding his state post-conviction claims.

The Commonwealth, however, claims that Petitioner did in fact have adequate notice to file his challenged claims under § 9545(b), as there existed a sixty-day window of opportunity from November 17, 1995, when § 9545(b) was enacted, until it took effect on January 16, 1996, during which Petitioner could have amended his initial state petition to include the challenged claims without running afoul of the statute's one year time limit. Such an amendment would not have been particularly arduous for Petitioner to seek, argues the Commonwealth, because during this sixty-day notice period, Petitioner was already involved in evidentiary hearings in state trial court pursuant to his initial PCRA petition. Amendment at that stage of the proceedings would not have delayed or interrupted the proceedings at all, but rather simply introduced additional issues that could have been made available for hearings themselves. Respondent also argues that such an amendment would have likely been permitted, noting that the presiding judge specifically asked Petitioner if he had "anything further" to raise in conjunction with his petition, and explained that it might well be his "very last opportunity in life" to do so. (N.T. 12/14/95, at 100.)

Two district court cases have addressed the adequacy of § 9545(b) as a grounds for finding procedural default, and have come to seemingly conflicting conclusions. In *Banks v. Horn,* 49 F. Supp. 2d 400 (M.D. Pa.1999), the petitioner made a claim of inadequacy very similar to the one Petitioner makes here. Banks argued that § 9545(b) was not an adequate ground on which to find procedural default because it was applied "retroactively" to prevent state court review of his collateral claims. *See Banks,* 49 F. Supp. 2d at 403. The court, however, found that the relevant date for examining the applicability of § 9545(b) was not the one year filing limit after Banks' conviction became final, but rather the date on which he filed a second PCRA petition. Since this was after the effective date of § 9545(b), it assured that the statute only be applied prospectively. The court determined that § 9545(b) was an adequate state procedural ground for denying state court review because it was not the retroactive application of a new statute that prevented Banks from having his claims heard in state court, but instead his "failure to raise the claims in the approximately 13 years that they were available for raising that prevented him from pursuing them. That period included the 60 day window of opportunity in which it was clear (due to the passage of the amendments to the PCRA) that the time for filing a petition would not be unlimited." *Id.* at 405; *see also Catanch v. Larkins,* 1999 WL 529036, at *7 (E.D. Pa. July 23, 1999) ("As the judgment against [petitioner] became final on November 18, 1990, . . . the statute of limitations [§ 9545(b)] would bar a PCRA petition filed after November 18, 1991. There is no indication that the Pennsylvania courts do not apply this rule consistently, and the rule is thus an adequate and independent state ground for denying habeas relief."(citation omitted)).

Other circuit court decisions have come to similar conclusions. *See, e.g., Glover v. Cain,* 128 F.3d 900, 902 (5th Cir. 1997) ("A state procedural rule enjoys a presumption of adequacy when the state court expressly relies on it in deciding not to review a claim for collateral relief."); *Hornbuckle v. Groose,* 106 F.3d 253, 255-56 (8th Cir. 1997) (finding that a state procedural rule requiring petitioner to file collateral claims concurrently with his direct appeal was adequate under the procedural default doctrine because petitioner had at least four months within which to file a valid state claim and failed to do so); *O'Dell v. Netherland,* 95 F.3d 1214, 1241 (4th Cir. 1996), *aff'd,* 521 U.S. 151 (1997); *Duvall v. Purkett,* 15 F.3d 745, 748 (8th Cir. 1994) (holding that petitioner's confusion as to the applicability of a 90-day time limit for filing state collateral claims does not excuse his procedural default because "such confusion should have persuaded [petitioner] to file a state habeas petition," rather than do nothing and wait for a possible default); *Barksdale v. Lane,* 957 F.2d 379, 382-83 (7th Cir. 1992) (finding that the retroactive application of a shortened statute of limitations was not a freakish or unexpected occurrence under state law, and therefore that petitioner's failure to comply with the statute constituted procedural default). *But see Moore v. Parke,* 148 F.3d 705, 710 (7th Cir. 1998) (concluding that, in case where new state procedural rule required collateral claim to be raised on direct appeal after petitioner's direct appeal was already completed, such a procedural rule was an inadequate ground for state post-conviction relief and procedural default will not preclude federal review of such claim).

A more recent decision in another district court, however, arrived at a slightly different result. In *Whitney v. Horn,* No. 99-1993 (E.D. Pa. June 7, 2000), petitioner Raymond Whitney included in his federal habeas petition numerous claims not presented in any state proceedings. He argued that these claims were not procedurally defaulted because the state provision denying him access to state review, § 9545(b), was not an adequate state ground on which to base such a finding of default. The court recognized the applicability of the statute and the opportunity for amendment during the sixty-day window of opportunity between the statute's enactment and its effectiveness. *See id.* at 11-12. The court distinguished *Banks,* however, on the grounds that, unlike Banks, Whitney had a petition for collateral relief pending before the Pennsylvania Supreme Court during the sixty-day window of opportunity, and that filing a second petition while another is pending is forbidden under Pennsylvania law. *See id.* at 14 ("The 60 day window between passage and the effective date of the PCRA amendments was of no help to Whitney because his first petition was pending during that period."); *Commonwealth v.*

Lark, 746 A.2d 585, 588 (Pa. 2000) ("[W]hen an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought . . . ."). Under the facts in *Whitney,* the petitioner was not afforded an adequate opportunity to pursue state review of his collateral claims because of the difficulties in amending a petition once it has reached the state supreme court: "Not giving [Whitney] a grace period before the revised PCRA took effect runs afoul of the fair notice requirement enunciated by the Supreme Court in *Ford* and by our Court of Appeals in *Cabrera.*" *Whitney,* No. 99-1993, at 14.

In the case at hand, any attempt by Petitioner to raise his challenged claims in state court was clearly barred when § 9545(b) took effect on January 16, 1996. Petitioner's conviction became final long before that on August 15, 1988, and the one year filing limit had long since run on August 15, 1989. Nevertheless, Petitioner had a PCRA proceeding underway in state court during the sixty-day window of opportunity between the enactment and effective date of § 9545(b). Unlike *Whitney,* the proceeding was before a state trial court during that window, thereby making it relatively easy for Petitioner to amend his petition within the statutory restrictions. The Pennsylvania Supreme Court expressly pointed out that, despite its holding that a petitioner could not file a subsequent

PCRA petition while one was pending in state court, it "will not preclude a trial court from granting leave to amend a PCRA petition that is currently pending before that court." *Lark,* 746 A.2d at 588 n.2. Furthermore, we believe and find that in December 1995, during the window of opportunity, the trial court judge brought this issue squarely to Petitioner's attention when he asked Petitioner during his initial PCRA hearings if he had anything else he would like to present and explained to Petitioner that this opportunity may be Petitioner's last to raise further issues in a collateral proceeding. (*See* N.T. 12/14/95, at 100.) This warning was couched in terms which any lay person could not fail to understand.

Petitioner's case is much more closely analogous to *Banks* than to *Whitney*. Banks had notice of § 9545(b) and sufficient opportunity to file any eventually defunct claims before the statute became effective. By contrast, Whitney faced much greater legal and practical obstacles to amending his PCRA petition before the sixty-day notice period expired. We find that our present Petitioner, Mr. Holland, had adequate opportunity to include his claims in his first petition for state collateral relief. Not only was he better able to amend his claims than Whitney, Petitioner was specifically warned by the trial judge at his state PCRA hearings that he may have no future opportunity to be heard. This warning satisfies the fair notice standards set forth by the Supreme Court in *Ford* and by the Third Circuit in *Cabrera*. In short, § 9545(b) was an adequate state procedural ground upon which Petitioner should have sought timely relief in state court.[12]

C. Petitioner's Substantive Claims

1. *General Standards of Review*

Having rejected both of Petitioner's theories of complete exhaustion of all claims, we will move on to analyze each of his twelve claims individually. In so doing, we will examine any portions of each claim that may have been procedurally defaulted in state court to determine if cause and prejudice exists to excuse the default and permit us to address the issue on its merits.

Federal review of defaulted claims is prohibited, unless Petitioner is able to "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law."[13] *Coleman*, 501 U.S. at 750. The Supreme Court has since identified three circumstances in which procedural default may be excused for cause: (1) if the "factual or legal basis for a claim was not reasonably available to counsel," (2) if some "interference by officials made compliance [with state procedural rules] impracticable," or (3) "if the procedural default is the result of ineffective assistance of counsel."[14] *Murray v. Carrier,* 477 U.S. 478, 488 (1986). If cause is established, a petitioner must then also demonstrate actual prejudice as a result of the procedural default. Actual prejudice requires that the petitioner "shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady,* 456 U.S. 152, 170 (1982) (emphasis in original). Petitioner does not contend that either of the first two circumstances demonstrating cause are relevant to his claims, and we agree and so find. He instead relies solely on assertions that his trial and appellate counsel were constitutionally ineffective in not raising his defaulted claims. (*See* Mem. Law Supp. Pet. Writ Habeas Corpus at 12-13.) We will therefore limit our analysis of Petitioner's defaulted claims to the adequacy of his legal representation.[15]

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[12] Because we reach the conclusion here that § 9545(b) is an independent and adequate state ground precluding federal review of Petitioner's omitted claims, we do not address the otherwise relevant question of whether Petitioner likewise waived his right to have these claims heard under 42 Pa. Cons. Stat. § 9544(b). We also recognize that our ruling comes while the Third Circuit is in the process of reviewing *Whitney*. In recognition of the severity of the death penalty, and because we do not know what position the Third Circuit will take in *Whitney* or how broad that ruling will be, we will review each of Petitioner's claims on the merits.

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[13] Another exception to the procedural default doctrine is recognized in cases where preclusion of federal review would result in a "fundamental miscarriage of justice." *Murray*, 477 U.S. at 495. This is a particularly rare exception, applicable only in cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 496. Actual innocence alone, however, is not a cognizable claim for habeas relief; petitioner must instead "*supplement[ ]* his constitutional claim with a colorable showing of factual innocence." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (emphasis in original). To establish actual innocence due to errors at trial, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). This represents a "stronger showing than that needed to establish prejudice." *Id.* In order to demonstrate actual innocence as a result of errors committed at sentencing, "one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Petitioner does not claim that any of his defaulted constitutional claims would result in a "colorable claim of factual innocence," and we therefore find that no miscarriage of justice existed with respect to any of those claims. *Id.* at 339.

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[14] The AEDPA has, in some circumstances, eliminated the cause and prejudice exception to procedural default in lieu of a more deferential standard of review for all capital habeas claims arising under § 2254. *See* 28 U.S.C. § 2264. This standard only applies, however, to convictions in states that satisfy the criteria set forth in 28 U.S.C. § 2261. Since Pennsylvania does not satisfy these criteria, we therefore continue to apply the traditional cause and prejudice analysis in Petitioner's case. *See Death Row Prisoners of Pennsylvania v. Ridge,* 106 F.3d 35, 36 (3d Cir. 1997).

Ineffective assistance of counsel is a violation of the Sixth Amendment, which guarantees every defendant "[i]n all criminal prosecutions . . the Assistance of Counsel for his defense." A showing of ineffective assistance requires satisfaction of two components. First, counsel must have been so deficient that his "representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 688 (1984). Second, a petitioner must show that counsel's "deficient performance prejudiced the defense." *Id.* In determining whether counsel acted reasonably, there remains a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *Diggs v. Owens,* 833 F.2d 439, 444-45 (3d Cir. 1987). Counsel's actions are evaluated "'on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Lockhart v. Fretwell,* 506 U.S. 364, 371 (1993) (quoting *Strickland,* 466 U.S. at 690). A lack of success is not proof of unreasonableness, *see Strickland,* 466 U.S. at 689, and strategic and tactical decisions are not grounds for an ineffective assistance claim unless counsel displayed "ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles." *Commonwealth of the Virgin Islands v. Weatherwax ("Weatherwax I"),* 20 F.3d 572, 579 (3d Cir. 1994), *rev'd on other grounds, Commonwealth of the Virgin Islands v. Weatherwax ("Weatherwax II"),* 77 F.3d 1425, 1435 (3d Cir. 1996).

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[15] Because we find that Petitioner fairly presented claims of ineffective assistance of trial and appellate counsel in his state collateral proceedings, he may therefore argue that such deficient representation amounts to an appropriate ground for finding cause. *See Edwards v. Carpenter,* 120 S. Ct. 1587, 1591 (2000) ("'[A] claim of ineffective assistance' . . . generally must 'be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. " (quoting *Murray v. Carrier,* 477 U.S. 478, 489 (1986))); *Holland II,* 727 A.2d 563, 565 (Pa. 1999) (acknowledging that Petitioner "asserts that both his appellate counsel and his trial counsel were ineffective"); (Br. Appellant 6/13/97, at 44-45).

Prejudice exists if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *see also United States v. DeRewal,* 10 F.3d 100, 104 (3d Cir. 1993) (defining prejudice as deprivation of "a trial whose result is reliable"). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. Outcome determination is not, however, the sole consideration in establishing prejudice. "[T]he 'benchmark' of an ineffective assistance claim is the fairness of the adversary proceeding." *Nix v. Whiteside,* 475 U.S. 157, 175 (1986). In order to establish prejudice as a result of deficient representation, a defendant must demonstrate that "counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Lockhart,* 506 U.S. at 369 (citing *Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986)). The prejudice standard applied in the ineffective assistance context is nearly identical to the actual prejudice standard for excusing a procedural default articulated in *Coleman.* As a result, we may rely on any findings of prejudice within our ineffectiveness inquiry to satisfy any claims of actual prejudice to Petitioner. Furthermore, the standard used to determine ineffective assistance as grounds for cause is identical to that applied with respect to substantive claims for relief under the Sixth Amendment. As a result, we rely on our above explanation of the *Strickland* standard in all our ineffective assistance inquiries.

If we do find sufficient cause and prejudice to excuse procedural default, then those federal habeas claims that were not submitted to state adjudication should be reviewed by us *de novo. See, e.g., Hameen v. State of Delaware,* 212 F.3d 226, 248 (3d Cir. 2000) ("[U]nder the AEDPA the limitation on the granting of an application for a writ of habeas corpus is only 'with respect to any claim that was adjudicated on the merits in state court proceedings.' Hence we exercise pre-AEDPA independent judgment . . . ."); *Smallwood v. Gibson,* 191 F.3d 1257, 1264 (10th Cir. 1999) (finding that under AEDPA "we are generally subject to two different frameworks of review, depending upon whether the state courts addressed the merits of the claim for relief. If the state courts have not heard the claim on its merits, we review the district court's legal conclusions de novo and its factual findings, if any, for clear error"); *Appel v. Horn*, 1999 WL 323805, at *5 (E.D. Pa. May 21, 1999) ("By the statutory terms, however, AEDPA . . . appl[ies] only when the issue facing the reviewing court has been 'adjudicated on the merits in State court proceedings.' When the state court fails to reach the merits of an issue presented to a federal habeas court, AEDPA's deferential standards do not apply . . . The district court must, therefore, 'exercise plenary review over state court conclusions on mixed questions of law and fact and pure issues of law,' as the court would have done prior to the enactment of AEDPA."). Of course if cause and prejudice are not present, we cannot review the defaulted portions of a claim and may examine only the remaining exhausted portions in accord with the AEDPA.

Under the AEDPA, a petitioner may not be granted federal habeas relief if his claims were adjudicated on the merits in state court, unless the state court decision was

> (1) . . . contrary to, or involved an unreasonable application of, clearly established federal law, as determined

> by the Supreme Court of the United States; or
>
> (2) . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Factual issues decided by the state court "shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).[16]

The "threshold question under AEDPA is whether [petitioner] seeks to apply a rule of law that was clearly established at the time his state court conviction became final." *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 1511 (2000). An existing federal law is "clearly established" unless it either "breaks new ground or imposes a new obligation on the States,"*id.* at 1495, or was not "dictated" by precedent existing when the petitioner's conviction became final. *Id.; see also Teague v. Lane,* 489 U.S. 288, 301 (1989). The fact that a federal standard "of necessity requires a case-by-case examination of the evidence, obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." *Williams,* 120 S. Ct. at 1512 (citation omitted) (finding the *Strickland* standard for ineffective assistance of counsel to be clearly established).

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[16] If no state court record exists with respect to a petitioner's claims, a federal evidentiary hearing may be held on the matter only if the petitioner satisfies two narrow criteria. First, he must show that his claim relies on either a new, retroactive constitutional law that was previously unavailable, or a factual predicate that could not, with the exercise of due diligence, have been previously discovered. Second, the petitioner must establish that the facts supporting his claim are sufficient to establish, by clear and convincing evidence, that but for constitutional error no reasonable factfinder would have found him guilty of the underlying offense. 28 U.S.C. § 2254(e)(2).

A state court decision is contrary to federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams,* 120 S. Ct. at 1523. "[I]t is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent *requires* the contrary outcome." *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 888 (3d Cir. 1999). It is likewise not necessary for a petitioner to cite factually identical Supreme Court precedent. He may instead rely on a Supreme Court rule that, by virtue of its factual similarity or intention to apply to variant factual situations, "can fairly be said to require a particular result in a particular case." *Id.* at 888-89.

A state court adjudication is an "unreasonable application" of clearly established federal law if the court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 120 S. Ct. at 1523. "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was *objectively unreasonable.*" *Id.* at 1521 (emphasis added). Although the term "unreasonable" is often difficult to define, the most important distinction is that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 1522 (emphasis in original). A state court decision cannot be found unreasonable unless, "evaluated objectively and on the merits, [it] resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Matteo,* 171 F.3d at 890. The Third Circuit is of the view that in evaluating reasonableness, federal habeas courts are not precluded from considering the decisions of lower courts. *Matteo,* 171 F.3d at 890 (citing *O'Brien v. Dubois,* 145 F.3d 16, 25 (1st Cir. 1998)). In fact, such lower court decisions may serve as "helpful amplifications" of Supreme Court precedent. *Id.*[17]

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[17] Other circuits take the view that only Supreme Court opinions constitute clearly established federal law for purposes of § 2254(d)(1). *See, e.g., Hernandez v. Johnson,*

(continued...)

2. *Claims I and II*

Petitioner's Claims I and II raise two main claims: ineffective assistance of counsel; and an assertion that Petitioner was denied his Fifth Amendment right to a court-appointed defense expert to assist in developing mental health defenses at trial. (*See* Pet. Writ Habeas Corpus at 5-31, 63-81.) Petitioner offers seven subclaims in support of his two main claims. Six of these subclaims address the ineffectiveness of counsel. He argues that his trial counsel was ineffective (1) for failing to obtain potentially helpful records; (2) for failing to investigate, develop, and present expert testimony; (3) for failing to properly interview and present testimony from Petitioner's family and other acquaintances; (4) for presenting harmful arguments and evidence on Petitioner's behalf; (5) for improperly investigating and introducing the testimony of two lay witnesses about Petitioner's level of intoxication on the night of Jewel Stevens'

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[17](...continued)
2001 WL 363528, at *17 (5th Cir. Apr. 11, 2001) (Dennis, J., dissenting) ("[T]he source of clearly established law is restricted by section 2254(d)(1) to the Supreme Court's jurisprudence."); *Doan v. Brigano*, 237 F.3d 722, 729 (6th Cir. 2001) ("[W]e may not 'look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.'" (quoting *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998))).

murder; and (6) for making inaccurate and prejudicial statements in association with Petitioner's intoxication defense at the penalty phase. The seventh subclaim argues that Petitioner was denied his Fifth Amendment due process right to a court-appointed defense mental health expert for assistance in developing trial defenses. Respondent argues that both of Petitioner's main claims are defaulted at least in part because they contain "different facts and legal theories" from those presented in prior state proceedings.[18] We find that Petitioner did raise the first two subclaims in state court. (*See* Holland II Brief at 12-38.) They were in turn decided on their merits under federal and state law and, as a result, are properly before this court for review under § 2254 of the AEDPA. *See Duncan v. Henry,* 513 U.S. 364, 365-66 (1995).

Petitioner did not, however, present any of the five remaining subclaims in state court. Both on direct appeal and in his state collateral proceedings, he failed to argue that his trial counsel was ineffective at sentencing due to his failure to properly interview Petitioner's family and friends, his introduction of arguments and evidence harmful to Petitioner's defense, his misuse of two intoxication witnesses, or his and the trial court's inaccurate and prejudicial statements regarding Petitioner's intoxication. He likewise failed to present to the state courts that he was allegedly denied his Fifth Amendment right to a court-appointed defense expert. We find that Petitioner procedurally defaulted these issues by failing to present them in state court. Petitioner nonetheless contends that these five defaulted subclaims are properly before this Court because he can demonstrate cause and actual prejudice to excuse his default.[19] *See Coleman,* 501 U.S. at 750.

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[18] Respondent neglected to point out precisely which differences it relied on for this position. Due, however, to the importance of this case, we elected to perform our own analysis of Claims I and II for exhaustion and procedural default purposes.

a. Defaulted Ineffectiveness Subclaims

Petitioner's third subclaim is that his trial counsel was ineffective at the penalty phase of his trial for failing to properly interview and present testimony from Petitioner's family members and other acquaintances. Although he failed to present this claim in state court, Petitioner argues that it is properly before this Court for review because his appellate counsel was constitutionally ineffective for failing to raise it on appeal, thereby demonstrating cause and prejudice for Petitioner's default. We reject Petitioner's contention that his appellate counsel was constitutionally ineffective on the ground that the underlying claim against his trial counsel is completely meritless. *See Strickland,* 466 U.S. at 691 (finding that counsel cannot be ineffective for failing to raise a meritless claim). Trial counsel did interview multiple members of Petitioner's family in preparation for the penalty phase. He presented testimony from Petitioner's mother, grandmother, and a neighbor and family friend in an attempt to establish Petitioner's history of mental illness and substance abuse and bolster his case for mitigation in sentencing. Nevertheless, Petitioner claims that counsel asked too few questions of his witnesses, and argues that counsel should have uncovered that Petitioner's mother drank during her pregnancy, that his stepfather was a "cruel, alcoholic gambler," and that Petitioner's basic physical needs were not provided for as a child. (Mem. Law Supp. Pet. Writ Habeas Corpus at 31-33.)

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[19] We do not mention the miscarriage of justice exception here because Petitioner presents no evidence of actual innocence. *See supra* note 12.

We find that Petitioner's trial counsel took adequate steps to introduce testimony from family members that would serve as evidence of mitigating circumstances in the eyes of the sentencing jury. This approach was not objectively unreasonable. Although more could have perhaps been done, it remains very much in question whether further actions would have served counsel's ultimate purpose, or would have instead given the appearance of a laundry list of unconvincing arguments, presented to the jury as part of a last-ditch, desperate attempt to establish any and all possible mitigating factors. Counsel's decision to focus on the most reliable and sincere accounts of Petitioner's childhood and background was well within the broad range of conduct granted a presumption of effectiveness under *Strickland.* Because trial counsel's method of eliciting testimony from Petitioner's family was not the product of ineptitude, inexperience, or a lack of knowledge or preparation, we dismiss Petitioner's argument that counsel was ineffective on this ground on its merits. Because we find that trial counsel was not constitutionally ineffective, appellate counsel cannot be ineffective for failing to raise such a claim. No cause is therefore available to excuse Petitioner's procedural default of this issue, and Petitioner's subclaim (3) is thus not entitled to federal review.

* * * *

b. AEDPA Review of Ineffectiveness Subclaims

Petitioner did, however, present two subclaims in state court, namely that his trial counsel was ineffective for failing to obtain records and to investigate, develop, and present expert testimony in mitigation of Petitioner's sentence. They are therefore subject to federal review in accordance with the AEDPA, which permits us to grant a writ of habeas corpus only if the state court rulings pertaining to Petitioner's claims were contrary to, or an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d).

Petitioner's first subclaim argues that his trial counsel was constitutionally ineffective at the sentencing phase of his capital murder trial because, among other things, counsel failed to obtain or review documents pertaining to potential mitigating circumstances. Counsel was aware that Petitioner had a prior criminal record, and that he had received psychiatric evaluations and treatment on numerous prior occasions.[29] (*See* N.T. 5/22/96, at 15-16.) Nevertheless, counsel chose not to review any of Petitioner's prior presentence ("PSI") reports, mental health evaluations, or school records. (*See* N.T. 5/22/96, at 15, 21-22.) He claimed that this omission was a strategic decision designed to avoid introducing further evidence of Petitioner's prior criminal record. (*See* N.T. 5/22/96, at 15-16.) Counsel instead relied solely on interviews with Petitioner's family in investigating Petitioner's psychiatric history. At sentencing, Petitioner's mother and grandmother testified that Petitioner had an unhappy and difficult childhood which, in their minds, left him emotionally and psychologically disturbed.[30] In his closing

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[29] A number of psychiatric evaluations were performed on Mr. Holland as a result of his prior involvement with the criminal justice system. Three evaluations were performed for the Court of Common Pleas of the County of Philadelphia by Dr. R.B. Saul between August 11, 1980 and July 29, 1981. All three describe Petitioner as suffering from schizoid personality disorder with paranoid traits and substance abuse. A presentence report was prepared in April 1981 in response to a robbery conviction. That report characterized the Petitioner as anti-social and devoid of insight into his own problems and the seriousness of his own offenses. More specifically, the report determined that Petitioner's criminal activity was the result of "psychiatric problems, drugs, and alcohol." (Report April 1981, at 7.) This report included a review of a previous evaluation by the Northeast Community Mental Health Center, which occurred on October 30, 1974, and diagnosed Petitioner with depression that is "behaviorally expressed." (Report October 1974, at 2.) Another mental health evaluation was ordered by the court in order to determine if Petitioner was competent to stand trial for

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[29](...continued)

the murder of Jewel Stevens. Dr. Jay Bonovitz performed that evaluation at the stipulation of both parties and found that, although Petitioner was competent to stand trial, he suffered from a personality disorder with sociopathic traits. This diagnosis was corroborated in a psychiatric evaluation ordered by the Court of Common Pleas of Philadelphia County, in which Petitioner was again found to be free from any primary affective disorders and competent to stand trial, but was nevertheless determined to be suffering from anti-social personality disorder and a lack of insight into the nature and extent of his psychopathology. (Report June 1985, at 3-4.)

[30] Specifically, Petitioner's mother testified that Petitioner "has been in prison most of his life, in his own mind." (N.T. 6/12/85, at 6.14.) Petitioner's grandmother then testified about Petitioner's childhood. She described him as a

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argument at sentencing, trial counsel reminded the jury that Petitioner's "family sa[id] that it has been quite obvious for a while that he needs psychiatric help," and that the case at hand is the "first time [Petitioner] has done anything violent." (N.T. 6/12/85, at 6.27.) He then went on to discuss the philosophical underpinnings of the death penalty, (*See* N.T. 6/12/85, at 6.23-6.24, 6.26), and to plead for mercy and compassion for his client. (*See* N.T. 6/12/85, at 6.30-6.31.) Counsel explained that he failed to review Petitioner's PSI reports and mental health evaluations because he "did not think getting into past cases and bringing up past reports . . . I did not want that to come out to the jury." (N.T. 5/22/96, at 17.)

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[30](...continued)
loner, a bed-wetter, and a child that never got over his father's death. (*See* N.T. 6/12/85, at 6.15-6.17.) She testified that Petitioner was "a good boy. He never hurt anyone . . . he did everything he could to help people." (N.T. 6/12/85, at 6.19.) As for testimony regarding Petitioner's mental condition, his grandmother explained he would get "terrible headaches." (N.T. 6/12/85, at 6.19.) She went on to explain that "I think Billy needs help. He doesn't understand a lot of things that he did, he doesn't know why he did them. I really think he needs psychiatric help now." (N.T. 6/12/85, at 6.18.) She repeated this analysis later in her testimony when she said "I really feel [Billy] needs psychiatric help. He's needed it for a long time . . . Maybe it will help him understand a lot of things in his growing up years that he could never figure out." (N.T. 6/12/85, at 6.21.)

The Pennsylvania courts ruled on Petitioner's ineffective assistance claim at two separate collateral proceedings. The Court of Common Pleas of Philadelphia County denied Petitioner's claim that his trial counsel was ineffective for failing to review existing PSI reports and mental health evaluations in preparation for sentencing. It concluded that Petitioner's counsel made a strategic decision not to introduce the reports because they would prove a detrimental reminder to the jury of Petitioner's lifelong pattern of lawlessness. *See Commonwealth v. Holland,* Nos. 1430-1441, at 8-14 (Pa. Ct. Common Pleas Phila. Cty. Sept. 16, 1996). The court likewise found that no actual prejudice existed in Petitioner's case, as the reports in question did not contain any information distinct from that elicited at sentencing through the testimony of Petitioner's family members and counsel's closing argument. *See id.* at 16-21. On appeal, the Pennsylvania Supreme Court upheld the decision of the Court of Common Pleas. *See Holland II,* 727 A.2d 563 (Pa. 1999). It echoed the lower court's determination that counsel had a strategic reason for failing to admit the PSI reports and mental health evaluations, specifically that doing so may have highlighted Petitioner's prior criminal activity and prejudiced the jury against him. *See id.* at 565-66.

As mentioned above, Petitioner's claim for habeas corpus relief may only be granted if the state courts' refusals to do so constitute an "unreasonable application of clearly established federal law."[31] 28 U.S.C. § 2254(d). "It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams,* 120 S. Ct. at 1512. The lone remaining question, then, is whether the Pennsylvania Supreme Court was objectively unreasonable in its decision to reject Petitioner's claim that his trial counsel was constitutionally ineffective at capital sentencing. More specifically, we must decide whether, "evaluated objectively and on the merits, [the state court decision] resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Matteo,* 171 F.3d at 890.

The state courts' decisions were not unreasonable applications of *Strickland.* Petitioner's trial counsel made a decision not to exhaust limited resources examining a body of documents he knew were the product of his client's prior criminal activities. He chose to rely instead on the accounts of Petitioner's closest relatives to demonstrate Petitioner's mental infirmities to the jury, thereby denying the Commonwealth the opportunity to repeatedly focus the jury's attention on Petitioner's criminal history by referring to the reason such documents were created. We find that it is not unreasonable to conclude that this tactical decision was not the product of ineptitude, inexperience, lack of preparation, or an unfamiliarity with the relevant legal principles and therefore that it does not represent ineffective assistance of counsel under *Strickland*.[32] *See Weatherwax I*, 20 F.3d at 579.

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[31] The other statutory criteria for determining if a claim for habeas corpus may be granted, i.e. if a state court decision was "contrary to" clearly established federal law or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" are inapplicable here. 28 U.S.C. § 2254(d).

We also find that the state courts acted reasonably in determining that trial counsel's decision not to review Petitioner's PSI reports and mental health evaluations did not meet *Strickland*'s actual prejudice standard. They found that the information available in the relevant documents was not appreciably different from that presented at sentencing by Petitioner's family. Under the AEDPA, we are required to defer to state court findings of fact that are not unreasonable "in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(2). As a result, because we do not consider the state trial court's factual conclusion unreasonable, and because Petitioner did not present clear and convincing evidence to rebut the state courts' factual findings, *see* 28 U.S.C. § 2254 (e)(1), we conclude that their application of *Strickland*'s prejudice standard to those facts was not unreasonable.[33] Counsel's failure to introduce Petitioner's PSI reports and mental health evaluations did not create a reasonable probability that the jury would have sentenced Petitioner differently, and Petitioner's claim of ineffective assistance therefore fails.

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[32] We arrive at this conclusion despite the fact that Petitioner's criminal record was introduced at sentencing anyway as part of 42 Pa. Cons. Stat. § 9711(d)(9), which permits the jury to consider as an aggravating circumstance in a capital sentencing proceeding a petitioner's "significant history of felony convictions." We find it a reasonable application of *Strickland* for the Supreme Court of Pennsylvania to determine that counsel made a strategic decision not to introduce any *further* evidence of Petitioner's prior convictions. The state supreme court's decision is likewise not inconsistent with counsel's own reference to Petitioner's prior criminal activity, because counsel introduced Petitioner's prior convictions only in his closing argument, and then solely to show that Petitioner had never committed a violent crime. (N.T. 6/12/85, at 6.26.)

Petitioner's second subclaim contains two separate contentions. First, Petitioner argues that his counsel was constitutionally deficient for failing to present expert testimony for purposes of mitigation at sentencing. Petitioner cites two examples of what he considers counsel's ineffectiveness with respect to expert testimony.[34] He claims that counsel violated his constitutional duty of representation by failing to present a defense expert in support of mitigation and by improperly limiting the scope of that expert's examination. Second, Petitioner contends that the trial court erred in excluding the testimony of Dr. Jay Bonovitz regarding Petitioner's level of intoxication on the evening in question. We address each of these contentions below under § 2254 of the AEDPA.

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[33] We note that the AEDPA's requirement that a state court decision be reasonable does not mandate that such a decision be correct. *See Williams*, 120 S. Ct. at 1522 ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.") (emphasis in original). As a result, we do not mean to imply by our ruling here that we consider the state court decisions to be either accurate or preferred applications of *Strickland*. We merely find that those courts acted reasonably, i.e. that the outcomes arrived at were not unjustifiable under existing Supreme Court precedent.

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[34] Petitioner includes as a third example of counsel's ineffectiveness his failure to provide Dr. Bonovitz, the neutral court-appointed expert assigned to examine Petitioner before trial, with presentence reports and mental health evaluations relevant to the examination. The Supreme Court of Pennsylvania found that counsel made a tactical choice in keeping those documents secret; namely to "minimize evidence that would have sounded against appellant . . . these examinations would have contained details of prior crimes, [and] trial counsel decided that pursuing a strategy of presenting such records would not be beneficial to [Petitioner]." *Holland II,* 727 A.2d at 565-66. We likewise determined *supra* that counsel's failure to review these documents himself did not constitute ineffective assistance. As a result, we adopt our earlier reasoning in finding that this example by Petitioner does not rise to the level of constitutionally ineffective assistance.

Petitioner first contends that his trial counsel was constitutionally ineffective for failing to present a defense expert in support of mitigation at sentencing. At a minimum, argues Petitioner, counsel should have recalled Dr. Jay Bonovitz to testify in support of Petitioner's intoxication on the night of the crime. "Dr. Bonovitz' report contains significant mitigating evidence and clearly shows the need for further investigation, development and presentation of expert mental health testimony." (Mem. Law Supp. Pet. Writ Habeas Corpus at 33.) Petitioner goes on to claim that his defense was prejudiced by counsel's failure to present such testimony. He argues that a mental health expert could have testified to Petitioner's "lifelong history of trauma, mental and emotional impairments, and substance abuse," and more specifically to Petitioner's previously diagnosed "personality disorder with schizoid and paranoid traits." (*Id.* at 35-36.)

The Supreme Court of Pennsylvania addressed this claim in Petitioner's state post-conviction proceedings, and determined that counsel had valid strategic reasons for refraining from requesting a court-appointed defense expert. *See Holland II,* 727 A.2d at 566. Specifically, the court concluded that counsel's decision was reasonable given the consistency in Petitioner's prior mental health examinations and the real potential for damage on cross examination. *See id.* The court specifically noted the testimony at Petitioner's state collateral proceeding of Dr. John O'Brien. *See* *id.* Petitioner called Dr. O'Brien as a mental health expert in order to show that his trial counsel's failure to present expert testimony of Petitioner's mental infirmities at sentencing prejudiced Petitioner's defense. Dr. O'Brien interviewed Petitioner personally and reviewed all of Petitioner's prior PSI reports and mental health evaluations. (*See* N.T. 12/14/95, at 15.) Despite Dr. O'Brien's testimony that he thought expert mental health testimony could have potentially assisted Petitioner's defense, (*see* N.T. 12/14/95, at 15, 18-19, 53, 56.) the Pennsylvania Supreme Court nonetheless found that the benefit of expert testimony to Petitioner was uncertain and that counsel's decision to focus on purely mitigating evidence, rather than become involved in a war over the true meaning of various expert evaluations, was not an unreasonable one. *See Holland II,* 727 A.2d at 566. Moreover, the repetitiveness and uncertainty of these evaluations did not, in the eyes of the Pennsylvania Supreme Court, gave rise to a reasonable probability that, but for counsel's decision, Petitioner would not have been sentenced to death. *See id.; Bryan v. Singletary,* 140 F.3d 1354, 1358-61 (11th Cir. 1998) (finding that defense counsel's failure to present expert witnesses, in light of prior mitigation testimony by family members and inconclusive notice that the experts would be certain to provide helpful information if called did not violate the Sixth amendment).

We find that the Pennsylvania Supreme Court's denial of Petitioner's claim was not an objectively unreasonable application of *Strickland.*[35] Under § 2254(d) of the AEDPA, we are required to defer to state court decisions that are neither contrary to, nor unreasonable applications of, clearly established federal law. Because Petitioner cites no Supreme Court precedent requiring an outcome different from that reached by the state court, we cannot find their decision contrary to federal law. We likewise cannot find the Pennsylvania Supreme Court's decision to be an unreasonable application of such law. Regardless of whether we would have arrived at the same conclusion, we cannot find the state court's decision of such a fact-specific situation objectively unreasonable. *See Williams,* 120 S. Ct. at 1521. As a result, we are bound by the AEDPA to reject Petitioner's contention.

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[35] We again note that our finding under the AEDPA standard for federal habeas review of state court decisions does not necessarily represent our agreement with the Pennsylvania Supreme Court's ultimate conclusion regarding Petitioner's claim. Although the term "unreasonable" in § 2254(d) is potentially difficult to define, the Supreme Court has made it clear that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams,* 120 S. Ct. at 1522. We therefore refrain from applying our own reading of *Strickland* to Petitioner's claims, and instead focus solely on the objective reasonableness of the state supreme court's decision.

Petitioner's next example of his trial counsel's ineffectiveness is the narrow scope of counsel's inquiry into Petitioner's mental state. Petitioner argues that his trial counsel only gathered expert testimony with respect to Petitioner's competency to stand trial and potential insanity defense, and that he should have looked further into Petitioner's history of depression. More specifically, Petitioner claims that "the details and depth of Mr. Holland's depression were not evaluated by the examiner in order that more time would be available to focus on Mr. Holland's state of mind at the time of the crime." (Mem. Law Supp. Pet. Writ Habeas Corpus at 73.) Petitioner's complaint itself defeats his claim of ineffectiveness. Petitioner's counsel made a strategic decision to focus on his client's state of mind at the time of the crime, rather than to pursue a bevy of other arguments in less detail. This is precisely the sort of strategic decision protected by *Strickland.* Counsel did not act out of ineptitude or inexperience, but rather out of concern for presenting the most convincing argument available given the resources available and the relative strength of the various defenses. We therefore agree with the state court's finding that counsel was not deficient in failing to object to the scope of Dr. Bonovitz' review, and reject Petitioners' argument on its merits.

Petitioner's second contention deals with the trial court's decision to exclude testimony of Dr. Bonovitz regarding Petitioner's level of intoxication on the evening of the murder. Dr. Bonovitz attempted to repeat on the witness stand what Petitioner had told him in an interview with respect to the number of alcoholic drinks Petitioner consumed on the night in question. (*See* N.T. 6/11/85, at 5.10-5.15.) The trial court excluded the testimony as inadmissible hearsay. (*See* N.T. 6/11/85, at 5.11.) Petitioner argues that the testimony was admissible, and that his counsel was therefore ineffective for not objecting to its exclusion, on the grounds that a psychiatric interview is precisely the sort of information reasonably relied on by psychiatrists in formulating opinions about their subjects. The Commonwealth responds by stating that experts are not exempt from the hearsay rule and by arguing that excluding Dr. Bonovitz' recitation of Petitioner's statements does not prohibit the doctor from voicing his opinion of Petitioner's level of intoxication based on their prior discussions. In fact, Petitioner's trial counsel was permitted to pose a hypothetical to Dr. Bonovitz based on prior testimony regarding Petitioner's alcoholic consumption in the early morning of August 11, 1984. (*See* N.T. 6/11/85, at 5.24-5.25.) The Pennsylvania Supreme Court denied Petitioner's claim, finding that Petitioner presented no evidence that Dr. Bonovitz could have presented any additional evidence at trial. *See Holland II*, 727 A.2d at 567. Since Petitioner cites no authority to contradict this conclusion, we find that it is neither contrary to, nor an unreasonable application of, clearly established federal law, and likewise reject both Petitioner's argument and any claims of ineffective assistance of counsel associated with it.

c. Mental State Defenses

Petitioner's second main claim is that he was denied his Fifth Amendment Due Process right to his own court-appointed defense expert for assistance in developing his mental health defenses at both the guilt and penalty phases of his state court trial. Petitioner and the Commonwealth had a pretrial conference with the trial judge on November 11, 1984. The parties agreed at that conference to a neutral court-appointed expert, Dr. Jay Bonovitz, to evaluate Petitioner's mental state and report directly to the court. (*See* Letter of Judge Kubacki 1/17/85.) This was in keeping with the law in effect at that time. *See, e.g., United States ex rel. Smith v. Baldi,* 344 U.S. 561 (1953); *McGarty v. O'Brien,* 188 F.2d 151 (1st Cir. 1951). *Ake v. Oklahoma,* 470 U.S. 68 (1985), was decided on February 26, 1985, a month after Dr. Bonovitz' appointment and nearly four months before Petitioner's trial. *Ake* held that a defendant asserting a mental health defense is entitled, under the Fifth Amendment, to a court-appointed expert to assist in preparing that defense. Petitioner, however, never explicitly requested that the court appoint a defense mental health expert in accordance with *Ake.* After the penalty phase, the trial court-appointed another neutral expert and ordered a presentence and a psychiatric report. (*See* N.T. 6/12/85, at 6.59.)

Petitioner responded by presenting a post-trial motion arguing that, under *Ake,* he was entitled to "the benefit of a presentence report, psychiatric and a [sic] medical studies" during the penalty phase. (N.T. 2/7/86, at 60.) Petitioner did not include in his post-trial motion any request for expert assistance in regard to the guilt phase of his proceeding. The trial court rejected his motion and accepted the jury's recommendation of death. (*See* N.T. 2/7/86, at 71-72.)

Although he did not raise this Fifth Amendment due process claim in any of his state court proceedings, Petitioner cites his trial and appellate counsel's ineffectiveness as cause for this omission, and argues that actual prejudice resulted, his default is thereby excused, and his claim for relief is properly before this court for review. The claims of ineffective assistance of counsel relied on by Petitioner to show cause for his default of his Fifth Amendment Due Process claim are nearly identical to those already denied on their merits in state court. The question therefore arises whether Section 2254(d) of the AEDPA, which establishes the standard to be followed by federal courts when reviewing claims already adjudicated on their merits in state court, applies to claims of cause aimed at excusing state court procedural default of other substantive claims. Section 2254(d) empowers federal courts to grant a writ of habeas corpus pursuant to "any claim that was adjudicated on the merits in State court proceedings" if the federal court finds that the state adjudication of that claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law." This is a highly deferential standard of review for federal courts, and was not the predominant standard applied to claims of cause under *Murray*, 477 U.S. at 488. Nevertheless, *Murray* predated the AEDPA. Recent decisions, however, have also refrained from applying the AEDPA standard in cases involving claims of cause and prejudice to excuse state procedural default. *See Edwards,*120 S. Ct. at 1591-92 (requiring that claims of cause due to ineffective assistance be exhausted in state court, but failing to expressly require that the AEDPA standard be applied by federal courts in finding a valid excuse to a petitioner's default).

Section 2254(d) addresses those situations in which a federal court may grant a writ of habeas corpus over a state court's contrary determination. It requires that a deferential standard of review be applied to *any claims* adjudicated on their merits in state court. The phrase *any claim* obviously refers to "any claim for habeas relief," as it is included in the section of the statute empowering federal courts to grant the writ. Does it also include a claim within a claim? Is a claim of ineffective assistance of counsel, when used merely to establish cause for the default of another constitutional claim, a "claim for habeas corpus relief?" Is it instead only an excuse offered to the court to explain why petitioner's ultimate claim for relief was not presented for state court review? Could a federal court reach a different result than a state court reached on an identical set of facts? If facts were an issue, would § 2254(d)(2) or § 2254(e)(1) apply?[36]

Applying § 2254(d) would make it more difficult to establish the cause and prejudice excuse for procedural default created by the Supreme Court in *Murray*. If federal courts are required to defer to state courts in evaluating every argument in favor of excusing a petitioner's procedural default on the terms outlined in § 2254(d)(1), it could be argued that by the language of the statute they would be permitted to grant habeas relief on Sixth Amendment Right to Counsel grounds, and any claim that a petitioner argued was excused from being procedurally defaulted would never need to be heard. We believe that the procedural default doctrine addressed by the Supreme Court in *Murray* is controlling and unchanged by § 2254(d).

There are obviously major comity concerns inherent in such a determination. As mentioned above, petitioners are required to present ineffectiveness of counsel claims in state court before submitting them as cause for the procedural default of additional claims. *See Edwards,* 120 S. Ct. at

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[36] The facts presently before us are not disputed.

1591-92. This requirement creates an inevitable tension between state and federal courts as they perform identical analyses without any assurances that the state court's constitutional ruling will be afforded the deference it deserves. Our conclusion with respect to the ineffectiveness of Petitioner's counsel depends upon whether or not our analysis is subject to § 2254(d). We do not find the Pennsylvania Supreme Court's determination that neither Petitioner's trial nor appellate counsel was constitutionally ineffective for failing to raise Petitioner's claim that he was entitled to a court-appointed defense expert under the Fifth Amendment either contrary to, or an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d). We cannot say that the Pennsylvania courts' determinations that counsel made a constitutionally permissible strategic decision not to pursue further expert testimony were contrary to that required by a Supreme Court decision "on a set of materially indistinguishable facts," *Williams*, 120 S. Ct. at 1523, or that state court applications of *Strickland* to the facts of Petitioner's case were "objectively unreasonable," *id.* at 1521, or unable to be reasonably "justified under existing Supreme Court precedent." *Matteo*, 171 F.3d at 890. As a result, if we were to apply § 2254(d)'s standard of review, we would not find that Petitioner satisfied the cause and prejudice requirement of *Murray* or that his Fifth Amendment claim was properly before this Court for review.

We have found that § 2254(d) does not apply, however, and in turn conclude that Petitioner can demonstrate that his appellate counsel was constitutionally ineffective, and therefore that Petitioner satisfies the cause and actual prejudice standard necessary to gain federal review of his defaulted claim. Petitioner asserts that both his trial and appellate counsel were ineffective. He argues that his trial counsel was deficient for failing to request that the state trial court appoint a defense expert for the purpose of eliciting information about Petitioner's mental health and substance abuse problems. He clearly should have done so. However, Petitioner's trial counsel filed a post-trial motion challenging the lack of a court-appointed defense expert in Petitioner's case. Despite the fact that the motion was dismissed, we cannot find trial counsel constitutionally ineffective for his lack of success.[37]

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[37] Any argument that Petitioner waived his Fifth Amendment claim by raising it for the first time in a post-trial motion is unfounded. First, there is no indication from the trial court that Petitioner's post-trial motion was not considered on its merits. Trial courts have discretion to consider previously unmentioned issues, and such consideration erases any preclusive effects of the waiver doctrine. *See Harman ex rel. Harman v. Borah*, 756 A.2d 1116, 1124 (Pa. 2000) ("Granting or denying an untimely objection lies in the discretion of the trial court.") Second, even if we did find that Petitioner's due process claim was waived by virtue of its being raised for the first time in a post-trial motion, such

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waiver would be excused by counsel's ineffectiveness in failing to raise it at trial. *See Commonwealth v. Nelson*, 523 A.2d 728, 736 (Pa. 1987) (finding that, in case of waiver, it becomes "incumbent upon appellant to show that those omissions constituted ineffective assistance of counsel"). Therefore, even if trial counsel's post-trial motion was denied on waiver grounds (which we find it was not), and cannot therefore be considered a ruling on the merits in state court for procedural default purposes, we nevertheless find that counsel's failure to raise the claim at trial constituted ineffective assistance of counsel. Such a finding of ineffective assistance represents valid cause and prejudice to excuse Petitioner's procedural default. As a result, Petitioner's Fifth Amendment claim is properly reviewable by this court.

There would be other evidence of trial counsel's ineffectiveness. Petitioner's counsel agreed to have the court appoint a neutral psychiatric expert (Dr. Jay Bonovitz) to examine Petitioner for competency and with regard to Petitioner's proposed insanity defense. (*See* Letter of Judge Kubacki 1/17/85.) Dr. Bonovitz interviewed counsel for both sides, the Petitioner, and his immediate family. Petitioner's counsel never showed Dr. Bonovitz any of the presentence ("PSI") reports or mental health evaluations that had accumulated in Petitioner's file over the previous 10 years. In fact, he admitted to having never even read any of these documents himself. (*See* N.T. 5/22/69, at 17.) Instead, counsel accepted Dr. Bonovitz as a neutral observer of Petitioner's psychiatric condition, and called him to testify solely as to the effect of alcohol on the human cerebral cortex. (*See* N.T. 6/11/85, at 5.20.) Dr. Bonovitz' report was never entered into evidence, nor was he called to testify at any other stage in the proceeding regarding Petitioner's mental
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[37](...continued)
health. At the penalty phase, where counsel attempted to establish Petitioner's mental infirmities as mitigation evidence, he presented no expert testimony whatsoever; he never requested that the court appoint a defense expert to explore Petitioner's psychiatric problems, nor did he recall Dr. Bonovitz to testify to what he observed regarding Petitioner's mental health.

Petitioner argues to us that counsel demonstrated a complete lack of preparation and knowledge in failing to request that the trial court appoint a defense expert to assist in the preparation of Petitioner's mitigation defense at the penalty phase. He likewise argues that his inability to take advantage of such an expert resulted in a violation of his Fifth Amendment right to access to the adversarial process. *See Ake v. Oklahoma,* 470 U.S. 68 (1985) (finding that the Fifth Amendment grants indigent defendants the right to have independent experts appointed by the court for assistance in establishing mental incapacity defenses).

In his defense, Petitioner's trial counsel claimed that he was forced to make a tactical decision against pursuing additional expert assistance due to insufficient resources being available from the court, and a dearth of factual support for calling a psychiatric expert on Petitioner's behalf. (*See* N.T. 5/22/69, at 13-14.) Trial counsel's lack of resources argument is clearly unfounded. *Ake* had been decided by the time of Petitioner's trial. In light of its holding that defendants have a constitutional right to their own court-appointed expert, once a request was made the trial judge was required to authorize expenditures for expert assistance. The Constitution's grant of a right is not conditioned on the cost of making that right available. The request should have

(continued...)

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[37](...continued)
been made and must have been granted. Trial counsel's argument that he had no factual basis to believe that another expert would be helpful to Petitioner's case is likewise unsupported. Counsel made no effort to ascertain what mental health defenses, if any, would be reasonably available to Petitioner, nor did he assist the one expert he did retain in gaining access to information relevant to such defenses. Because counsel never reviewed Petitioner's mental health records, he was unable to advise Dr. Bonovitz of this potential source of valuable information or to make an informed judgment himself regarding the value of additional expert mental health testimony to Petitioner's defense. Willful blindness is not a valid basis for an attorney's tactical decision.

Any additional defenses by trial counsel that he was unaware of Petitioner's rights or that the Supreme Court's opinion was not sufficiently clear are also baseless. The *Ake* decision had been established for at least four months before Petitioner's trial began. It contained a clear statement of a change in the scope of the Fifth Amendment, requiring that defendants be appointed their own experts in cases in which the mental state of the defendant is of significance. *See, e.g., Starr v. Lockhart,* 23 F.3d 1280, 1289 (8th Cir. 1994) (extending a defendant's Fifth Amendment right to expert assistance to capital sentencing proceedings). In short, any strategic decision allegedly made by counsel to refrain from asking the trial court to appoint a defense expert for assistance at either trial or sentencing is clearly the product of "ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles" and violates counsel's constitutional duty of adequate representation. *Weatherwax I,* 20 F.3d at 579.

(continued...)

We nevertheless find that Petitioner's appellate counsel on direct appeal to the Pennsylvania Supreme Court was constitutionally deficient. He did not raise any claims regarding Petitioner's lack of a court-appointed psychiatric expert to assist the defense. (*See* Holland I Brief at 7-30.) Petitioner argues that his appellate counsel's deficiencies were unreasonable and that they prejudiced his defense at sentencing. The Commonwealth responds by asserting that counsel had a strategic justification for withholding those claims and that, in any event, raising them would have been fruitless due to both an absence of resources for investigation and a lack of a factual basis to support mitigation of Petitioner's sentence.

Petitioner's appellate counsel testified at a state collateral proceeding. When asked why he

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[37](...continued)

This deficient performance prejudiced Petitioner by depriving him of any informed presentation of his mental infirmities. At his state collateral proceedings, Petitioner called Dr. John O'Brien, another psychiatric expert who, unlike Dr. Bonovitz or Petitioner's trial counsel, was familiar with all of Petitioner's prior records. Dr. O'Brien testified that an expert analysis of Petitioner's mental condition could have established a mitigating circumstance at sentencing, and that this in turn creates a reasonable probability that, but for counsel's error, the penalty phase jury's ultimate determination may have been different. (*See* N.T. 12/14/95, at 18-19.)

chose not to present claims of trial counsel's ineffectiveness on direct appeal, counsel responded that he believed such claims could be brought later in collateral proceedings and that they were therefore not a sound use of the scarce funds afforded him by the court for his investigation. (*See* N.T. 12/14/95, at 70-74.) The mere opportunity to raise an issue later, especially when that issue may be subject to a different standard of review under the PCRA, does not constitute a defensible strategic justification under *Strickland*. Neither, as we explained above, does an alleged lack of funds justify inadequate representation. Despite admitting that he thought trial counsel's performance was "wretched," appellate counsel requested neither additional funds from the court nor a remand for further evidentiary hearings to investigate trial counsel's potential ineffectiveness. (*See* N.T. 12/14/95, at 78.) Either of these approaches would have alleviated any funding dilemma counsel faced.

Petitioner's appellate counsel also testified that he was unsure as to the benefit to be derived from a defense mental health expert. (*See* N.T. 12/14/95, at 79-86.) According to appellate counsel himself, however, this uncertainty was due to his complete lack of knowledge of Petitioner's mental health, social, and educational backgrounds, (*see id.* at 92-93) as well as of the controlling Supreme Court precedent requiring courts to appoint defense mental health experts in cases involving the defendant's mental state so that those experts may assist in the evaluation, preparation, and presentation of the defense. *See Ake,* 470 U.S. at 80, 83. Appellate counsel, like his predecessor at trial, knew nothing of Petitioner's mental health background or Fifth Amendment rights. (*See* N.T. 12/14/95, at 92-93.) His contention that no factual basis existed for pursuing Petitioner's claim is therefore groundless. There is no evidence that appellate counsel had familiarized himself with either the relevant law or facts of Petitioner's case sufficiently to make his representation reach acceptable constitutional levels. As a result, he is unable to claim that his omission of related arguments from Petitioner's direct appeal was the product of a strategic decision not founded on "ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles." *Weatherwax I,* 20 F.3d at 579.

We also find that appellate counsel's deficient performance prejudiced Petitioner's case. According to Dr. O'Brien, counsel's failure to challenge the denial of a defense mental health expert created a reasonable probability that, but for this omission, Petitioner may have been afforded a stronger argument for mitigation and, therefore, a different sentence. The constitutionally ineffective performance of Petitioner's appellate counsel therefore represents cause and prejudice for Petitioner's state procedural default. This default is in turn excused under *Coleman,* 501 U.S. at 750, and Petitioner's claim that he was denied his Fifth

Amendment rights to a defense expert at sentencing is properly before this court for review on its merits.[38]

Petitioner alleges that he was denied his Fifth Amendment right to a court-appointed psychiatric expert for assistance in developing defenses at the guilt and penalty phases of his state murder trial. Because this claim was procedurally defaulted and is before us by virtue of Petitioner demonstrating cause and prejudice for that default, we are not constrained by the standard of review set forth in the AEDPA, 28 U.S.C. § 2254(d). Our review of Petitioner's claim is instead *de novo* with regard to all legal issues.[39] *See Hameen v. State of Delaware,* 212 F.3d 226, 248 (3d Cir. 2000) ("[U]nder the AEDPA the limitation on the granting of an application for a writ of habeas corpus is only 'with respect to any claim that was adjudicated on the merits in state court proceedings.' Hence we exercise pre-AEDPA independent judgment . . . ."). Applying this standard of review, we find that Petitioner was denied his right to a court-appointed expert to "assist in the evaluation, preparation, and presentation of [his] defense" at the penalty phase only, and grant Petitioner's request for habeas corpus relief on those grounds.[40] *Ake,* 470 U.S. at 83. We do not, however, find that

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[38] Our decision to uphold the Pennsylvania Supreme Court's denial of Petitioner's ineffective assistance claim is not inconsistent with our previous decision to address the underlying Fifth Amendment claim to a court-appointed defense expert on the grounds that Petitioner demonstrated cause and prejudice for his state procedural default of that claim. In evaluating counsel's effectiveness for cause and prejudice purposes, we apply *Strickland* and its progeny *de novo*. *See* discussion *supra* Part III.C.2.c. Our review of a prior state court decision on its merits, however, is controlled by § 2254(d) of the AEDPA, which only permits federal reversal of state court decisions if they are either contrary to, or an unreasonable application of, clearly established federal law. Since we are unable to find so severe an error on the part of the Pennsylvania Supreme Court, we feel obliged to uphold their prior decision on those grounds, despite the fact that our own interpretation of *Strickland* yields a different result. *See Williams*, 120 S. Ct. at 1522 (finding that an incorrect application of federal law is not necessarily an unreasonable one for purposes of AEDPA review).

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[39] Our standard of review with respect to factual issues is more deferential, but does not apply in this instance, as our only consideration regarding Petitioner's claim involves purely legal questions. We base all of our analyses on the facts as they appear in the record.

[40] There is no question that *Ake* is applicable to Petitioner's case. Petitioner's trial began on June 5, 1985. The Supreme Court decided *Ake* on February 26 of that year. Although this was after the trial court-appointed Dr. Bonovitz, the opinion is nonetheless fully applicable to Petitioner's case, as his case was clearly "pending on direct review" at the time *Ake* was decided. *See Griffith v. Kentucky,* 479 U.S. 314, 322 (1987) (finding that Supreme Court decisions in criminal cases apply to all cases "pending on direct review" at the time of the decision).

Petitioner is entitled to relief from his murder conviction.

The Supreme Court addressed the importance of making mental health experts available to defendants in *Ake,* in which it held:

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in *evaluation, preparation, and presentation of the defense.*

Id. at 83 (emphasis added). The *Ake* Court distinguished *United States ex rel. Smith v. Baldi,* 344 U.S. 561 (1953), and *McGarty v. O'Brien,* 188 F.2d 151 (1st Cir. 1951), which had previously determined that the appointment of neutral psychiatrists, i.e. those that were assigned to perform investigations and prepare reports for submission directly to the court, satisfied an indigent defendant's Fifth Amendment right to an adversarial proceeding, provided the expert examined the defendant and was not "beholden to the prosecution." *McGarty,* 188 F.2d at 155. Under *Ake,* the Fifth Amendment Due Process right to psychiatric assistance "does not mean the right to place the report of a 'neutral' psychiatrist before the court;

rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate." *Smith v. McCormick,* 914 F.2d 1153, 1157 (9th Cir. 1990); *see also Starr v. Lockhart,* 23 F.3d 1280, 1289 (8th Cir. 1994).

The *Ake* holding, however, is not limited to cases involving insanity defenses. The Court also found a violation of due process because the defendant was denied a court-appointed psychiatrist for purposes of developing mitigation evidence at capital sentencing. *See Ake,* 470 U.S. at 86-87; *see also Starr,* 23 F.3d at 1289 ("As *Ake* explains, due process requires access to an expert who will conduct, not just any, but an appropriate examination. We find that [Defendant's] exam was inappropriate because it did not delve into the mitigating questions essential to [Defendant]."); *id.* at 1290 (finding that Defendant's ability to subpoena and question state examiners under oath did not amount to appropriate access to "experts who will 'assist in evaluation, preparation, and presentation of the defense'"); *Smith,* 914 F.2d at 1158.

Part of the purpose of this requirement is to ensure confidentiality between the examining expert and the defendant.

> A psychiatrist will of necessity make inquiry into the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney

> cannot be used to furnish proof in the Commonwealth's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential Commonwealth witness.

United States v. Alvarez, 519 F.2d 1036, 1046-47 (3d Cir. 1975); *see also Smith,* 914 F.2d at 1160 ("Confidentiality must apply not only to psychiatric assistance at trial, but also to such assistance for sentencing in capital cases.").

A similar situation to that confronting Petitioner here was addressed in *Christy v. Horn,* 28 F. Supp. 2d 307 (W.D. Pa.1998). *Christy* involved a petition for habeas corpus under 28 U.S.C. § 2254, and addressed the question, among others, of whether a writ should issue on the grounds that the petitioner was denied his Fifth Amendment right to a court-appointed mental health expert. The court determined that, in order to properly decide this issue, it must establish

> (1) whether [petitioner] made a sufficient showing to the trial judge that his sanity would be a "significant factor at trial," (2) whether petitioner

> received competent psychiatric assistance for his defense, and (3) whether the refusal to provide [petitioner] with psychiatric assistance was harmless error.

Id. at 320. The court performed this analysis with respect to both the guilt and sentencing phases of the petitioner's capital murder trial. With regard to whether the petitioner made a sufficient showing that his sanity would be a "significant factor at trial," the court found that petitioner had adequately established that his mental state was at issue by expressly informing the trial court of that fact pre-trial, and by virtue of the fact that the trial judge was aware of the petitioner's prior mental health problems. For these reasons, the court determined that "*Ake* required the appointment of a psychiatrist to *assist petitioner in his defense*." *Id.* (emphasis added)

The court next found that the psychiatric assistance afforded the petitioner was inadequate. The two psychiatrists appointed by the court, Drs. Olivier and Chavern, "failed to address [petitioner's] needs as the accused. Neither . . . aided [petitioner] in marshaling the facts to assist in developing any defenses." Dr. Chavern, for example, testified at a competency hearing that petitioner was competent and showed no other evidence of insanity at the time of the crime. Because Dr. Chavern's testimony "undermined any defense that [petitioner] might have hoped to pursue," and because it involved only a "conclusory review of [petitioner's] records," the court found this examination insufficient under the Fifth Amendment and *Ake*. *Id.* at 321. The court concluded by stating generally that "[a] defendant is denied the essential benefits of an expert when the services of a doctor must be shared with the prosecution." *Id.*

The *Christy* court then performed a harmless error analysis to ensure that the denial of the petitioner's Fifth Amendment rights precluded the petitioner from asserting a real defense under Pennsylvania law. The Pennsylvania Supreme Court ruled that this denial was in fact harmless error because "psychiatric assistance would not have provided Christy with a defense under Pennsylvania law because Christy was diagnosed merely with a personality disorder." *Id.* The federal habeas court, however, disagreed, finding that *Ake* required psychiatric assistance "'to help determine whether the insanity defense is viable.' Thus, implicit within *Ake,* such assistance is required when a defendant's mental state is at issue, even if the defendant ultimately abandons an insanity defense." *Id.* (quoting *Ake,* 470 U.S. at 82). The court went on to find that the Pennsylvania Supreme Court's interpretation of the record was inaccurate, determining that the "record is replete with multiple diagnoses that support the conclusion that Christy suffers from severe mental illness." *Id.* at 322. The court based this conclusion in part on the post-conviction collateral hearing testimony of an additional mental health expert, Dr. Shields, who indicated that the petitioner "*might have, in fact, been able to* succeed with a diminished capacity defense." *Id.* The *Christy* court found that the trial court's error was not harmless because, under the circumstances, the petitioner's "mental condition was his only viable defense and his strongest argument in mitigation for sentencing purposes." *Id.* The court pointed out that a psychiatrist could have testified to the impact of the petitioner's mental impairments "throughout his lifetime and particularly on the night in question," as well as "the effect of prolonged drug and alcohol abuse on an individual with [petitioner's] mental impairments." *Id.* Finally, the court found that psychiatric testimony was necessary for the petitioner to explain his horrible conduct to the jury, and to rebut aggravating circumstances presented by the prosecution. *See id.*

Petitioner's case strongly resembles that of his counterpart in *Christy*. Petitioner made it clear in a pretrial conference on November 7, 1984 that he intended to present mental health defenses, but did not explicitly request a court-appointed mental health expert for the defense at that time. The trial judge and the parties in turn agreed to a neutral court-appointed expert, Dr. Jay Bonovitz, to evaluate Petitioner's mental state and report directly to the court. (*See* Letter of Judge Kubacki

1/17/85.) Dr. Bonovitz' appointment occurred before the Supreme Court's ruling in *Ake*, and was consistent with case law at that time. It therefore cannot be considered a violation of defendant's due process rights. *Ake* was decided on February 26, 1985, nearly four months before Petitioner's trial. At the close of Petitioner's penalty phase, the trial court-appointed another neutral expert and ordered a presentence and a psychiatric report. (N.T. 6/12/85, at 6.59.) Petitioner responded by presenting a post-trial motion arguing that, under *Ake*, Petitioner was entitled to "the benefit of a presentence report, psychiatric and a [sic] medical studies" during sentencing. (*See* N.T. 2/7/86, at 60.) The trial court rejected his motion and accepted the jury's recommendation of death. (*See* N.T. 2/7/86, at 71-72.) We find that Petitioner adequately presented his need for a court-appointed mental health expert in his post-trial motion.[41] (*See* N.T. 2/7/86,

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[41] It is possible to read *Christy* to mean that the trial court, upon receiving notice of Petitioner's intent to present mental health defenses, must *sua sponte* appoint a defense expert to assist Petitioner with such defenses. Under the facts in this case, we cannot fault the trial judge for failing to appoint a defense expert when Petitioner did not ask him to do so until after the trial. Such clairvoyance cannot be required of trial judges who, in the course of handling many criminal proceedings, are faced with many difficult and pressing issues. We therefore do not interpret *Christy* to place the onus on the trial court to exercise a defendant's Fifth Amendment rights under *Ake*, but instead focus our

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at 61 (objecting to the lack of scientific evidence available to the defense during the penalty phase).)

Petitioner was also denied proper expert assistance. His case is virtually identical to that found sufficient to grant the writ in *Christy*. The trial court-appointed a neutral psychiatric expert, Dr. Jay Bonovitz, as the sole evaluator of both Petitioner's mental history and his mental state at the time of the crime. Dr. Bonovitz was not alerted by trial counsel to the numerous PSI reports and mental health evaluations chronicling Petitioner's history, and therefore did not take them into account in his analysis. He testified only during the guilt phase of the trial, and then only on the effects of alcoholic beverages on the cerebral cortex. (*See* N.T. 6/11/85, at 5.20-5.24.) He delivered his report directly to the court; it was never introduced into evidence by either party. The report did not address any of Petitioner's potential mental health defenses. It did, however, point out that Petitioner "became evasive" when asked about the details of the crime, noting that such a reaction could be a function of the lack of confidentiality between Dr. Bonovitz and Petitioner. (*See* Report Dr. J. Bonovitz at 1-2.)

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[41](...continued)
analysis on Petitioner's post-trial motion requesting such expert assistance as the proper ground on which to claim relief. The court should have granted this post-trial motion.

Furthermore, like the experts appointed in *Christy,* Dr. Bonovitz' conclusion regarding competency "undermined any defense that [Petitioner] might have hoped to pursue." *Christy,* 28 F. Supp. 2d at 321. Unlike the expert employed in *Christy,* however, Dr. Bonovitz performed even less than a "conclusory review" of Petitioner's record; he didn't review it at all. Such an omission in turn made it virtually impossible for Dr. Bonovitz to meet his duty under the Fifth Amendment of "marshaling the facts to assist in developing any defenses." *Id.* Dr. Bonovitz provided no assistance in the preparation or formation of Petitioner's case. Petitioner was in turn denied the essential benefits of an expert because he was forced to share Dr. Bonovitz with the prosecution.

Unlike the petitioner in *Christy,* however, we do not find that Petitioner's lack of a court-appointed mental health expert resulted in actual prejudice at every stage of Petitioner's state murder trial. We instead find that the trial court's denial of Petitioner's post-trial motion constituted harmless error with regard to the guilt phase of his state trial, but was not harmless with respect to the penalty phase. A defendant in Pennsylvania may raise one of two mental health defenses at the guilt phase of a capital murder trial. First, he may assert that he was criminally insane under the *M'Naghten* test. *See* Pa. Cons. Stat. § 314(d). *M'Naghten* entitles a defendant to an acquittal if he can demonstrate, by a preponderance of the evidence, that he had a mental disease or defect that caused him either "not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong." 18 Pa. Cons. Stat. § 314(c)(2). Petitioner presented no evidence at trial to support either of these conclusions, and the jury and Pennsylvania Supreme Court on direct review under § 9711 (h)(3)(i) both found that the evidence presented was sufficient to support a finding of specific intent to kill.

The second available defense requires a showing that "as a result of an abnormal mental condition [Petitioner] was at the time of the killing incapable of" the specific intent required for a finding of first-degree murder. *Pennsylvania Criminal Suggested Standard Jury Instructions* § 5.01B (8th Supp. 2000). Petitioner also presents no evidence that he was unable to form the requisite intent for first-degree murder. In fact, the record reflects Petitioner admitting that he entered the Victim's apartment on the morning of August 11, 1984 with the intent "to rape somebody." (N.T.6/6/85, at 2.57.) This clearly demonstrates Petitioner's ability to form a criminal intent, and is consistent with both the jury and the Pennsylvania Supreme Court's findings regarding the sufficiency of evidence in support of Petitioner's first-degree murder conviction. Furthermore, none of Petitioner's prior psychiatric evaluations or presentence reports found that Petitioner suffered from any condition that would inhibit his ability to form a criminal intent. They focused instead on his having a personality disorder with sociopathic traits, his traumatic background and childhood, and his substance abuse. (*See, e.g.,* Report Dr. J. Bonovitz at 2-3; Report April 1981, at 7.) We find that none of these evaluations represent evidence of an inability to form the intent necessary to be found guilty of first-degree murder, and therefore reject Petitioner's claim that his lack of a court-appointed mental health expert for assistance in preparing defenses at the guilt phase of his state murder trial was anything other than harmless error.

Our conclusion is further supported by the fact that Petitioner never requested a defense expert during the guilt phase of his state murder trial. His post-trial motion argued only that he needed a court-appointed mental health expert for assistance in developing mitigation evidence at the penalty phase. We find that this is the extent of Petitioner's remediable claim. Petitioner neither requested relief in conjunction with the guilt phase of his state trial, nor is he entitled to it under the circumstances.

We are not, however, by virtue of our conclusions regarding the guilt phase, precluded from finding that actual prejudice existed at the penalty phase. The standard established for finding mitigation at the penalty phase is different from that relied on as a defense to guilt for first degree murder. As mentioned above, a guilt phase diminished capacity defense requires a showing that the defendant did not form the specific intent necessary to satisfy the statutory definition of first-degree murder. By contrast, Pennsylvania's mitigating circumstances do not require such a high degree of mental infirmity to justify mitigation. They instead require a showing that the "defendant was under the influence of extreme mental or emotional disturbance" or that a defendant's poor mental health constitutes "evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." *See* 42 Pa. Cons. Stat. § 9711(e)(2), (8). The United States Supreme Court has found that penalty phase juries must be afforded every opportunity to exercise their discretion in granting a sentence of life imprisonment. *See Eddings v. Oklahoma,* 455 U.S. 104 (1982); *Lockett v. Ohio,* 438 U.S. 586 (1978).

We are satisfied that the evidence presented by Petitioner is relevant to a finding of the two mitigating factors mentioned above, and that his lack of a court-appointed mental health expert actually prejudiced his defense at the penalty phase. Like the petitioner in *Christy,* Petitioner's record was replete with multiple diagnoses, as well as expert testimony from his post-conviction proceedings supporting a finding of actual prejudice as a result of his not having a court-appointed mental health expert at the penalty phase of his state trial. Dr. John O'Brien testified at Petitioner's post-conviction hearing that a diminished capacity defense may have been viable at the penalty phase in light of Petitioner's mental history. (*See* N.T. 12/14/95, at 18-19.) Dr. O'Brien likewise explained that a mental health expert could have testified to the impact of Petitioner's prolonged drug abuse and other mental infirmities on his life generally and on his state of mind in the early morning of August 11, 1984. (*See* N.T. 12/14/95, at 15, 18-19, 53, 56.) Finally, like the petitioner in *Christy,* Petitioner did not experience harmless error because his mental condition was "his only viable defense and his strongest argument in mitigation for sentencing purposes." *Christy,* 28 F. Supp. 2d at 322. As a result, Petitioner is able to establish, commensurate with the petitioner in *Christy,* the requisite harm for relief from his death sentence under the Fifth Amendment.

In light of the Supreme Court's clearly established position in *Ake,* and in conjunction with a very similar decision by the court in *Christy,* we find that Petitioner was denied his Fifth Amendment right to a court-appointed defense expert at the penalty phase of his state court proceeding. We do not, however, find that a similar error was committed with respect to the guilt phase of Petitioner's trial. Petitioner did not make such a claim, nor did he present evidence capable of establishing an inability on the part of Petitioner to form the necessary intent to be acquitted of first-degree murder. As a result, we grant Petitioner's request for relief from his death sentence on the ground that he was improperly denied a court-appointed defense expert for help in developing defenses in support of mitigation at the penalty phase, but deny such relief in connection with his first-degree murder conviction. Despite our finding that Petitioner is deserving of a writ on these grounds, we nonetheless consider the remainder of his claims in order to determine an appropriate remedy.

* * * *

IV. CONCLUSION

For the foregoing reasons, we vacate Petitioner's death sentence and remand to the Pennsylvania courts for the purpose of resentencing Petitioner. Petitioner presented twelve claims for habeas corpus relief, each of which consisted of multiple subclaims and arguments. We find that one of these issues has merit. In his Claim II, Petitioner correctly argues that he was improperly denied his Fifth Amendment right to a court-appointed defense expert for assistance in developing mental health defenses at both the guilt and penalty phases of his state trial. Petitioner was particularly concerned, as are we, that such a denial interfered with his ability to present evidence in support of mitigation at sentencing. The severity and permanence of the death penalty cautions us to consider very carefully the effect of any errors in Petitioner's legal process. Society's right to levy the ultimate penalty must be conditioned on a commitment to reliability in assigning that penalty. Therefore, in light of the constitutional errors associated with the penalty phase of his state murder trial, we conclude that the death penalty is improperly supported in Petitioner's case, and remand it to the state courts for resentencing.

It is so ordered.

[J-199-1997]

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	No. 153 Capital Appeal Docket
Appellee	Appeal from the order of the Court of Common Pleas of Philadelphia at Nos. 1430 to 1441 October Term 1984 entered September 16, 1996
v.	
WILLIAM HOLLAND	
Appellant	SUBMITTED: October 30, 1997

OPINION

MR. JUSTICE ZAPPALA
DECIDED: April 1, 1999

This is a direct appeal[1] from the order of the Philadelphia County Common Pleas Court denying

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[1] All appeals in cases involving the death penalty are reviewable only by this Court. See 42 Pa.C.S. § 9546(d).

Appellant, William Holland, the relief he sought under the Post Conviction Relief Act (PCRA).[2]

After a jury trial, Appellant was found guilty of burglary, robbery, attempted deviate sexual intercourse, and murder of the first degree. After a separate sentencing hearing, according to 42 Pa.C.S. § 9711, Appellant was sentenced to death. This Court affirmed both the conviction and sentence on direct appeal. See *Commonwealth v. Holland*, 518 Pa. 405, 543 A.2d 1068 (1988). The Common Pleas Court has denied Appellant's petition for collateral relief, and Appellant now appeals from that denial. We affirm.

As a threshold matter, we must determine whether Appellant is eligible for post conviction relief under 42 Pa.C.S. § 9543. First, Appellant has shown that he was convicted of a crime under the laws of this Commonwealth and is awaiting execution of a sentence of death for the crime. 42 Pa.C.S. § 9543(a)(1)(ii). Appellant alleges ineffective assistance of trial and appellate counsel. 42 Pa.C.S. § 9543(a)(2). The remaining two questions concerning PCRA eligibility are whether the allegation of error has been previously litigated, or otherwise waived, 42 Pa.C.S. § 9543(a)(3), and whether the failure to previously litigate the issue was the result of any rational, strategic or tactical decision by counsel. 42 Pa.C.S. § 9543(a)(4).

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[2] 42 Pa. C.S. § 9541 *et seq.*

Appellant could have raised the issue of ineffectiveness of trial counsel during his direct appeal, since he was represented by new counsel for that appeal. However, Appellant asserts that both his appellate counsel and his trial counsel were ineffective, thereby avoiding the waiver issue. See *Commonwealth v. Morales*, 549 Pa. 400, 409, 701 A.2d 516, 520 (1997).

Although it is presumed that counsel rendered effective assistance, Appellant may rebut that presumption by first demonstrating that the underlying claim is of arguable merit. He must also show that counsel's action or inaction lacked any reasonable basis for advancing Appellant's interests. See *Commonwealth v. McNeil*, 506 Pa. 607, 487 A.2d 802 (1985). Further, Appellant must show that the omission of counsel so undermined the trial that the verdict was unreliable. *Commonwealth v. Cross*, 535 Pa. 38, 43, 634 A.2d 173, 175 (1993). Since the issue is raised as a PCRA claim,

> the petitioner must plead and prove by a preponderance of the evidence all of the following:
>
> * * *

> (2) That the conviction or sentence resulted from one or more of the following:
>
> (i) A violation of the Constitution of the Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

42 Pa. C.S. § 9543(a).

Appellant's first specific allegation is that trial counsel was ineffective for failing to investigate and present evidence that Holland had suffered from a long history of mental disorders as mitigating circumstances during the sentencing phase of the trial. We reject this argument because trial counsel was acting in an attempt to minimize evidence that would have sounded against Appellant. Appellant cites several different records of various mental infirmities in both his youth and adult life. Testimony from the PCRA hearing indicates that these reports were the product of psychological examinations of Appellant as a result of criminal activity, such as pre-sentence reports prepared following Appellant's earlier convictions. Because these examinations would have contained details of prior crimes, trial counsel decided that pursuing a strategy of presenting such records would not be beneficial to Appellant.[3] Because

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[3] Direct examination of trial counsel during the PCRA hearing produced this testimony:

> Q. Let me lay some groundwork for that: Did you review the prior psychiatric reports and pre-sentence reports that had been produced by the Court and the Court's experts in prior cases?
>
> A. No, I did not review those reports. I think, as I told you earlier, the thrust of my defense in this case was that this Defendant did not commit this crime and he did not have the propensity to commit this type of heinous act and it was [sic] matter of strategy.
>
> I knew that he had prior convictions and I knew that he had other dealings with these detectives and if I were to go into prior acts or prior convictions, I may very well convince the jury through my own deeds, that this man has no respect for the law.
>
> He is a constant and continuous law breaker and this type of crime was just an extension of his criminal history and so I wanted to diminish putting on the record the

(continued...)

counsel's omission of these psychological tests was a calculated and reasonable attempt to advance his client's interests, an analysis of whether Appellant was prejudiced by this tactic is unnecessary.[4]

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[3](...continued)

> previous conviction and the previous record of convictions.
>
> * * *
>
> Q. How would the pre-sentence and psychiatric reports lead to the jury knowing about his prior record?
>
> A. Because it would show he had prior interaction with the police and also contain the factual summary of every case, as far as I know, the pre-sentence report.

N.T. 5/22/96 at 15-16.

[4] Appellant argues that because the PCRA court drew parallels between the instant case and *Commonwealth v. Buehl*, 540 Pa. 493, 658 A.2d 771 (1995), the court used a heightened standard for evaluating ineffective assistance of counsel claims that has been held to be improper. The heightened standard he refers to arises from the *Buehl* plurality opinion's differing treatment of ineffective assistance claims raised under the PCRA as against ineffective assistance claims raised on direct appeal. The authority he cites as finding the heightened standard improper is *Buehl v. Vaughn*, 1996 WL 752959 (E.D. Pa. 1996). There, the United States District Court for the Eastern District of Pennsylvania granted Buehl's petition for habeas corpus as to

(continued...)

Appellant also asserts that trial counsel was ineffective for failing to call upon a mental health witness to testify during the penalty phase of the trial. Again, Appellant asserts that he was prejudiced by this omission. However, Appellant also fails to show that this omission was not a reasonable tactical choice.

At trial, counsel chose to have Appellant's mother and grandmother testify. They testified

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[4](...continued)
sentencing upon finding that trial counsel had rendered ineffective assistance with respect to the penalty phase.

In *Buehl v. Vaughn*, the court suggested that the plurality opinion of this Court in *Buehl* was "internally inconsistent and confusing." 1996 WL 752959, *15. Ultimately, however, the court seems to have left the decision as being a matter of state law, and "appl[ied] established federal law to Petitioner's claims without trying to sort out the confusion of the court in *Buehl*" to determine whether to grant habeas corpus relief. *Id*. at *16. Thus that case does not stand for the proposition that a heightened standard for reviewing ineffective assistance claims in PCRA cases has been held to be unconstitutional.

Moreover, this case is distinguishable from *Buehl*. There, the plurality acknowledged that the appellant would have had a valid ineffectiveness claim had it been raised on direct appeal, but the claim did not meet the heightened standard for relief under the PCRA. Appellant here does not present any claims which would have passed the threshold test enunciated in *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987), for an ineffectiveness claim on direct appeal.

that Appellant was a loner and opined that he needed help.

During the evidentiary hearing, Dr. John O'Brien II, a forensic psychiatrist and attorney, testified that Appellant suffered a history of alcohol and mixed substance abuse, and also a mixed personality disorder with schizoid antisocial traits. Dr. O'Brien opined that Appellant was a long time substance abuser. He based this opinion on the examinations and reports of Appellant's previous treatments as well as his own examination of Appellant. Neither Dr. O'Brien nor the reports of past examinations presented evidence of a major mental illness. Moreover, the reports contained opinions, diagnoses, and other statements that could have been detrimental to Appellant.

For example, Dr. Richard Saul examined Appellant in 1980 and 1981. Dr. Saul's reports stated that Appellant was difficult to motivate in treatment and that he was superficial and hostile. Dr. Saul reported that prognosis for Appellant's recovery from drug abuse was poor. Appellant never voluntarily sought help from mental health professionals. In 1985, Dr. Edwin Camile examined Appellant. Dr. Camile's reports stated that Appellant did not appear "to be motivated to explore or examine his behavior in a therapeutic context." N.T. 12/14/95, at 42. Thus it appears that trial counsel attempted, during the penalty phase, to present evidence in a manner that would not be more damaging than it was mitigating. Appellant's mother and grandmother indicated that Appellant had a troubled childhood and history of anti-social behavior. Had Dr. O'Brien been presented to establish the same point, counsel would have risked portraying Appellant as a long-term, unrepentant, drug addicted, increasingly dangerous menace to society.

Appellant next suggests that trial counsel was ineffective for not recalling Dr. Bonovitz during the penalty phase of the trial. Dr. Bonovitz is a drug and alcohol abuse expert who had testified during the guilt phase of the trial. During his testimony, Dr. Bonovitz spoke generally about the effects of drugs and alcohol on the human brain.

In order to make a claim of ineffectiveness for failure to present a witness, Appellant must prove: (1) that the witness existed; (2) that counsel was either aware of or should have been aware of the witness's availability; (3) that the witness was willing and able to cooperate on behalf of the Appellant; and (4) that the proposed testimony was necessary to avoid prejudice to the Appellant. See *Commonwealth v. Hall*, 549 Pa 269, 290, 701 A.2d 190, 200 (1997). Appellant does not indicate what Dr. Bonovitz would or could have testified to during the penalty phase. Appellant asserts that trial counsel never requested that Dr. Bonovitz evaluate Appellant for mitigation purposes. This assertion is simply not supported by the testimony presented to the PCRA court. Dr. Bonovitz did not testify at that hearing. Furthermore, trial counsel testified that,

> Yes, I did consider calling him [Dr. Bonovitz] at the penalty phase but I needed more compensation--I don't recall but, as I said, he could state generally the impact of alcohol on one's brain and its impact on a person's inhibitions but in this particular case, based on the facts that were available to me, he could not make such a statement as to this case and to this Defendant.
>
> He could not say that this Defendant was under the influence of alcohol to the extent it would affect his mental or psychological process. I don't think that at any time from then until now he has made such a statement.

N.T. 5/22/96 at 10-11. Because Appellant failed to show that Dr. Bonovitz would have provided helpful testimony beyond that which he had already given in the guilt phase of the trial, Appellant's claim is without merit.

Appellant also claims that counsel was ineffective for failing to specifically reference the statutory language for mitigating circumstances. This claim is without merit. As the PCRA court below noted, we addressed this very issue in *Commonwealth v. Williams*, 532 Pa. 265, 615 A.2d 716 (1992).

> It is true that defense counsel did not precisely reference the language of the mitigating circumstances of which there was some evidence verbatim, or attempt to characterize certain evidence as falling within a specific mitigating circumstance. However, it is clear that defense counsel did argue the facts [underlying the mitigating circumstances of duress and mental duress]....
>
> By not specifically tying his argument to one particular subsection, counsel encouraged a greater range of favorable responses and maximized appellant's chances, given the weakness of the purported evidence in mitigation and the overwhelming evidence of guilt. Therefore, we find no sufficient basis upon which to conclude that trial counsel was ineffective in presenting his closing argument with respect to mitigating circumstances during the penalty phase.

532 Pa. at 287, 615 A.2d at 727.

In the present case, counsel argued that the defendant was a young man, that he had a lack of history of violent crime, and focused on his family connection with his mother and grandmother. Although he did not attempt to categorize these circumstances according to their corresponding statutory equivalents under 42 Pa.C.S. §§ 9711 (e)(1), (e)(4), and (e)(8), such characterization is not necessarily an infringement of Appellant's constitutional right to effective assistance of counsel for the reasons articulated in *Williams*.

Appellant asserts error in the jury instructions regarding mitigating circumstances. This Court first reviewed these instructions on direct appeal. See 518 Pa. at 420-421, 543 A.2d at 1074-1075. At that time, we found that the trial court had erred in its charge that the jury should calculate the number of aggravating circumstances and compare that number against the number of mitigating circumstances. A proper instruction would have been for the jury to weigh the aggravating circumstances against the mitigating, thus introducing a qualitative element instead of a purely quantitative calculation. However, since the jury failed to find a single mitigating circumstance, we found this error to be harmless.

Now, Appellant suggests that counsel failed to object to yet another error in the jury instructions. He asserts that the court failed to notify the jury that it did not need to be unanimous in order to find a mitigating circumstance. This assertion is without merit. This Court has found that jury instructions which affirmatively assert, "if you find an aggravating circumstance or a mitigating circumstance, you will find that it must be unanimous," are grounds for granting relief. *Commonwealth v. Billa*, 521 Pa. 168, 187, 555 A.2d 835, 845 (1989). This is based on the ruling of the United States Supreme Court in *Maryland v. Mills*, 486 U.S. 367 (1988), where the Court concluded:

> There is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not to risk.

486 U.S. at 384.

However, *Mills* does not require that the jury be affirmatively instructed that mitigating circumstances need not be unanimously found before any juror may weigh them. It only holds that where there is a high risk that instructions could be understood as requiring unanimity as to mitigating circumstances, the sentence must be vacated.

The judge's instructions to the jury here were:

> Now, the verdict of the jurors, ladies and gentlemen of the jury, remember to consider all the evidence that you have heard here today. Give it the weight which it is entitled and decide for yourselves what circumstances caused this killing. Remember, you are not merely recommending a punishment. The verdict that you will return will actually fix the punishment at either death or life imprisonment. Remember again that your verdict must be unanimous. It cannot be reached by any majority vote or any person's vote. It must be the verdict of each and every one of you. To repeat, if you find one aggravating circumstance and no mitigating circumstance, your verdict will be death. If you find no aggravating circumstances and no mitigating circumstances, the

> sentence will be life. If you find one aggravating and one mitigating, it will be life. If you find more aggravating circumstances than you find mitigating circumstances, then the penalty will be death.

N.T. 6/12/85 at 6.55. This Court has determined that language similar to the instructions given here does not violate the dictates of *Mills*. *Commonwealth v. Banks*, 540 Pa. 143, 150, 656 A.2d 467, 470 (1995).

Finally, Appellant asks this Court to consider whether all of counsel's errors should be considered in the aggregate since such an accumulation of error would show substantial prejudice. We need not address this question however. Since none of Appellant's allegations of counsel's errors are well founded, we find no errors to aggregate.

For the reasons herein set forth the order of the Court of Common Pleas of Philadelphia County is affirmed.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

- - -

COMMONWEALTH OF PENNSYLVANIA	**OCTOBER TERM, 1984**
v.	
WILLIAM HOLLAND	**NOS. 1430-1441**

- - -

OPINION

GREENSPAN, J. **DATED 9/16/96**

On August 14, 1984, petitioner, William Holland, was arrested and charged with burglary, aggravated assault, rape, and related offenses arising from an incident which occurred on August 11, 1984, in the victim's home at 7829 Langdon Street in Northeast Philadelphia. The victim of the assault, Jewel Stevens, died at Nazareth Hospital on August 24, 1984, and murder charges were thereafter filed against defendant.

On June 5, 1985, a trial commenced before the Honorable Stanley L. Kubacki in the Court of Common Pleas, First Judicial District of Pennsylvania, Trial Division. Petitioner plead not guilty to charges of, *inter alia*, first degree murder, burglary, and attempted rape. On June 12, 1985, the jury returned a verdict of guilty on all the charges, including first degree murder. The jury deliberated after a penalty phase and returned a sentence of death.[1] On February 7, 1986, the court denied the petitioner's post-verdict motions and imposed the death sentence on the murder charge (Bill of Information Number 1430, October Term, 1984).[2]

New counsel was appointed to represent petitioner on his direct appeal to the Pennsylvania Supreme Court. On May 20, 1988, the Supreme Court of Pennsylvania affirmed the petitioner's conviction and death sentence. *See Commonwealth v. Holland*, 518 Pa. 405, 543 A.2d 1068 (1988). On July 28, 1994, then Governor Robert P. Casey signed petitioner's death warrant, scheduling execution for the week of October 16, 1994.

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[1] The jury found the following three aggravating circumstances, and accordingly returned a sentence of death: (1) the petitioner committed a killing while in the perpetration of a felony; (2) the offense was committed by means of torture, and; (3) the petitioner had a significant history of felony convictions involving the use or threat of violence to the person. 42 Pa.C.S. §§ 9711 (d)(6), (d)(8), (d)(9). The jury found no mitigating circumstances.

[2] In addition, the Court imposed three consecutive ten (10) to twenty (20) year terms of imprisonment on the charges of burglary, attempted rape, and attempted involuntary sexual intercourse (Bill of Information Numbers 1437, 1438, and 1441, October Term, 1984). Sentence was suspended on the robbery charge (Bill of Information Number 1439, October Term, 1984). (N.T. 2/7/86: 71).

On October 6, 1994, petitioner filed a *pro se* petition for post conviction relief with this Court pursuant to the Post-Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.* On October 7, 1994, this Court entered an order staying petitioner's execution for ninety days, pending the filing of a counseled PCRA petition. Counsel was appointed for the petitioner, and an amended PCRA petition and memorandum of law challenging trial and appellate counsel's effectiveness was subsequently filed with this Court. On January 25, 1995, this Court granted petitioner a further stay pending the disposition of the instant amended petition for relief.[3]

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[3] This Court presided over three evidentiary hearings in connection with this P.C.R.A. petition. The first hearing was held on July 13, 1995. This hearing was an opportunity for oral argument only. No witnesses were called, and petitioner himself was not present. At the second evidentiary hearing, held December 14, 1995, two witnesses testified – Dr. John O'Brien, a psychiatrist, and Norris Gelman, Esquire, petitioner's appellate counsel. At the third hearing, held May 22, 1996, petitioner's trial counsel, Alli Majeed, testified. Petitioner was present at the latter two hearings. Delay in this case was occasioned by petitioner, especially as to the extraordinary effort required to satisfy petitioner's desire to have his trial counsel, presently a judge in Florida, testify.

The facts of the case are as follows. In the early morning hours of August 11, 1984, the petitioner burglarized the apartment of a seventy-one (71) year old woman. When the woman awoke, the petitioner stripped her clothes off, tied her hands and feet with a Venetian blind cord, and sexually assaulted her. During the course of the assault, the petitioner stabbed the woman five times, three times in the abdomen, with a knife and an onion peeler. The petitioner also inserted a straight-pin into the woman's foot. The petitioner then ransacked the woman's apartment and took a small amount of money.

A police officer who arrived on the scene observed a man who closely resembled the petitioner running away from the apartment building. Three days later, the petitioner was apprehended at his grandmother's house. Once at police headquarters, petitioner made two separate inculpatory statements. On August 24, 1984, thirteen days after the assault, the victim died at Nazareth Hospital, having undergone several surgical attempts by doctors to save her life.

In his PCRA petition, petitioner makes five claims challenging trial counsel's effectiveness.[4]

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[4] The Commonwealth argues that the petitioner's claims are all waived under the Post-Conviction Relief Act, 42 Pa.C.S.A. § 9544(b). This Court, however, will address

(continued...)

Petitioner also makes a sixth claim of ineffectiveness of appellate counsel. Petitioner seeks as relief either a new trial, a sentence of life imprisonment, or a new penalty hearing. For the following reasons this Court finds, based upon independent and adequate state law grounds, that the petitioner's claims are unsubstantiated. Accordingly, the petitioner's PCRA petition is denied on the merits, and the stay of execution is henceforth lifted.

Petitioner's first claim is that his trial counsel rendered ineffective assistance by failing to present evidence that intervening medical malpractice was the actual cause of the victim's death. Petitioner contends that, had such an argument been made, it may have resulted in a verdict of other than first degree murder. (Petitioner's Brief at 4). This claim is entirely meritless.

In Pennsylvania, a defendant's actions are the legal cause of death if they are a direct and substantial factor in bringing it about. *Commonwealth v. Stafford*, 451 Pa. 95, 301 A.2d 600 (1973). Causation is an essential element of murder that the Commonwealth must prove beyond a reasonable doubt. *Commonwealth v. Paquette*, 451 Pa. 250, 301 A.2d 837 (1973). To determine if causation exists, two questions must be answered: first,

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[4](...continued) petitioner's claims on their merits.

was the petitioner's conduct an "antecedent but for which the result in question would not have occurred," 18 Pa.C.S. § 303 (a) (1); and second, were the petitioner's actions a direct and substantial factor in bringing about the victim's death, or was the death so attenuated and remote that it would be unfair to subject the petitioner to criminal sanction? *Id.* at 254, 301 A.2d at 839.

Additionally, criminal causation involves a case-by-case determination of the chain of events leading to the final result. *Commonwealth v. Rementer*, 410 Pa.Super. 9, 598 A.2d 1300 (1991), *alloc. denied,* 533 Pa. 599, 617 A.2d 1273 (1992). An intervening and superseding act will break the chain of causation. However, if such intervening agency was foreseeable, then the actor is not relieved from responsibility. *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949). *cert. denied*, 339 U.S. 924, *reh. denied,* 339 U.S. 950 (1950), *cert. denied*, 340 U.S. 867 (1950). Thus, an actor "cannot escape the natural consequences of his act merely because of foreseeable complications." *Commonwealth v. Paquette*, 451 Pa. 250, 254, 301 A.2d 837, 839 (1973). Lastly, an actor's conduct need not be the sole cause of the victim's death in order to establish a causal connection. *See Commonwealth v. Rementer*, 410 Pa.Super. 9, 20, 598 A.2d 1300, 1305 (1991), *alloc. denied* 533 Pa. 599, 617 A.2d 1273 (1992).

In the instant case, criminal responsibility rests with the petitioner because the victim's death was the direct result of being stabbed three times in the abdomen. Dr. Rolando Juarez, M.D., the primary treating physician at Nazareth Hospital, stated at trial that the victim arrived at the hospital with five stab wounds, three of which were to the abdomen.[5] Dr. Juarez also testified that the victim had two puncture wounds on her left foot from a pin which the receiving nurse removed from the victim's foot upon the victim's arrival at the hospital. (N.T. 6/6/85: 2.5). Exploratory surgery revealed that "[the victim] had blood inside the abdomen, in moderate to small amounts. [The victim] had contamination . . . the bowel had ruptured, so there was a spillage of bowel contents into the abdominal cavity." (N.T. 6/6/85: 2.6). There was also "blood leaking into the [victim's] urinary system." (N.T. 6/6/85: 2.5). Dr. Juarez testified to the victim's uncontrollable death:

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[5] Dr. Juarez described two of the wounds as follows:

> stab wounds, one of them about what we called mid-clavicular line on the left side, about one inch and a quarter length and another one posterior to it in the so-called posterior axilary lines or on the side, it was a very deep laceration . . .

(N.T. 6/6/85: 2.4).

> Her condition continued to stabilize after forty eight hours after infections set in. And there was a cascade of deterioration infections. She required another exploration, and thereafter the kidney failed, the lungs failed and the heart failed and she died of what I believe was multiple organ failure. . . .

(N.T. 6/6/85: 2.11). When asked at trial what the victim's chances of survival were upon her arrival at the hospital, Dr. Juarez stated that, "she had some chance of living but it was very, let's say, less than fifty percent." (N.T. 6/6/85: 2.11). Additionally, on August 25, 1984, Dr. Halbert Fillinger, who conducted the postmortem exam of the victim, also determined the cause of death to be stab wounds of the abdomen and left arm, and the manner of death to be homicide. (N.T. 10/3/84: 3).[6]

The underlying causation claim is clearly without merit because the medical intervention by the physicians at Nazareth Hospital was reasonably foreseeable in light of the five stab wounds which the victim suffered in the assault. Moreover, there is *no* evidence in the record to support petitioner's claim that medical malpractice played a part in the victim's death. The chain of causation initiated by the stab wounds was not broken when the doctors attempted to repair the victim's vital organs, the kidney and bowel, which were both ruptured by the stabbings. It was foreseeable that, despite the doctors' efforts, the victim's ruptured vital organs would ultimately break down and cause her death. Thus, the petitioner's criminal acts on August 11, 1984, unquestionably initiated the chain of causation which led to the victim's death on August 24, 1984. Criminal responsibility for the crime of homicide is therefore properly attributed to the petitioner. *See Commonwealth v. Hicks*, 466 Pa. 499, 505, 353 A.2d 803, 805 (1976); *see also Commonwealth v. Massart*, 469 Pa. 572, 577, 366 A.2d 1229,1232 (1975); *Commonwealth v. Stafford*, 451 Pa. 95, 100, 301 A.2d 600, 604 (1973); *Commonwealth v. Cheeks*, 423 Pa. 67, 73, 223 A.2d 291, 294 (1966).

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[6] At trial Dr. Rllinger confirmed these findings, stating that:

> The cause of death in the case of Jewel Stevens, stab wounds of the abdomen and left arm . . . the manner of death is homicide."

(N.T. 6/10/85: 4.37).

In a second though related claim, petitioner asserts that his trial counsel was ineffective for failing to call a medical witness to present a causation defense. This claim is also without merit. Counsel cannot be found ineffective for having elected not to raise a meritless claim. *Commonwealth v. Pettus*, 492 Pa. 558, 424 A.2d 1332 (1981); *Commonwealth v. Giknis*, 491 Pa. 215, 420 A.2d

419 (1980). In the instant case, petitioner's actions unquestionably caused the victim's death, and therefore his claim that his trial counsel should have called an expert witness to argue otherwise lacks arguable merit. Moreover, although petitioner's counsel did not call a medical witness, counsel did raise the causation defense when he cross-examined Dr. Fillinger as follows:

> I wonder if you would be kind enough to explain how this lady was stabbed on 8-11 and was in the hospital with all the care for her and after thirteen days, they were not able to save her life. Maybe it is out of ignorance on my part, would you be able to explain that to us, please?

(N.T. 6/10/85: 4.38). Here petitioner's trial counsel raised the causation defense, and yet the jury, rejecting this defense, obviously found that the petitioner's actions caused the victim's death. The fact finder is free to believe all, part or none of the evidence. *Commonwealth v. Long*, 425 Pa.Super. 170, 184, 624 A.2d 200, 207 (1993).

At a recent evidentiary hearing presided over by this Court, petitioner's trial counsel, the Honorable Alli B. Majeed, testified regarding what he believed was the feasibility at trial of a causation defense. Judge Majeed, who is presently a state trial court judge in Broward County, Florida, testified,

> Yes, the issue [of causation] was explored and was deliberated at great length and discussed with the defendant. The files were reviewed and it was my decision, as a matter of strategy, as if I were to pursue causation, it would lead to the disclosure of more egregious and more aggravating factors.
>
> The victim in this case was brutally murdered, brutally and when the State called its witness on causation, I thought the State was rather brief in getting to the gore and detail of the death and if I were then to cross examine and try to establish some other cause resulted in death, the State would have a second opportunity to get to the witness again and basically what I did, by not disputing the causation, was to limit the witness' testimony to one-third of what it would have been. I didn't give the witness pre-chances to talk about the gore and brutality and egregious nature of this murder.

(N.T. 5/22/96: 5).[7] As petitioner's trial counsel explained, he believed in good faith that a causation defense lacked both merit and a reasonable basis to effectuate his client's interests. Counsel's strategy to avoid a causation defense was reasonable under the circumstances. Thus, based on the findings of both Dr. Juarez and Dr. Fillinger, the stabbing was plainly an act but for which the victim's death would not have occurred, and the stabbing was a direct and substantial factor in bringing about the victim's death. Petitioner's assertion that his trial counsel was ineffective for failing to call a medical witness to contradict this evidence is without merit.

The petitioner's third claim is that trial counsel was ineffective at the penalty phase of petitioner's trial "by failing to investigate, obtain and present evidence of petitioner's background and long history of mental disorders in mitigation of the death penalty." (Petitioner's Brief at 6). Petitioner contends that information was available "that would have reflected a long history of psychiatric and emotional problems extending back to the petitioner's early juvenile years." *Id.* Petitioner claims that trial counsel was ineffective for failing to present this information in mitigation of the death penalty. Petitioner's claim has no merit.

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[7] Judge Majeed also testified that "I had the autopsy report of every cut, of every wound, of the depth of the damage to the internal organs and I basically decided to limit the narrative of brutality to one-third." (N.T. 5/22/96: 7).

To establish a claim of ineffective assistance of counsel in Pennsylvania, petitioner must first demonstrate that the underlying claim is of arguable merit. *Commonwealth v. Christy*, 540 Pa. 192, 201, 656 A.2d 877, 881 (1995); *see also Commonwealth v. Cross*, 535 Pa. 38, 45, 634 A.2d 173, 176 (1993). Once it is established that the claim is of arguable merit, petitioner must then show that his lawyer's action or inaction lacked any reasonable basis for advancing his client's interests. *Id.* Lastly, petitioner must demonstrate that the act or omission of counsel prejudiced the petitioner. *Commonwealth v. Carpenter*, 533 Pa. 40, 617 A.2d 1263 (1992). Counsel is presumed effective, *Commonwealth v. Pierce*, 515 Pa. 153,159, 527 A.2d 973, 975 (1987), and the burden of proving ineffectiveness of counsel is on the party alleging it. *Commonwealth v. Miller*, 494 Pa. 229, 233, 431 A.2d 233, 234 (1981).

Trial counsel's decision not to present petitioner's juvenile evaluations, petitioner's presentence reports performed for prior convictions, and petitioner's prior post-arrest psychological evaluations, was reasonably designed to effectuate petitioner's interests. Petitioner's trial counsel reasonably sought to avoid the damaging evidence contained in these evaluations, including evidence of petitioner's criminal history, his hostile nature, and the potential threat he poses to society.[8] Moreover, testimony given by defense witnesses called at the penalty phase, in addition to trial counsel's comments at the penalty phase closing argument, sufficiently revealed petitioner's psychological history. Therefore, petitioner's claim that trial counsel's failure to review and present the reports to the jury constitutes ineffective assistance of counsel is entirely without merit.

Petitioner's claim must be rejected in light of the Supreme Court's holdings in *Commonwealth v. Yarris*, 519 Pa. 571, 549 A.2d 513 (1988), and *Commonwealth v. Buehl*, 540 Pa. 493, 658 A.2d 771 (1995). In *Yarris*, the appellant argued that his trial counsel had been ineffective during the penalty phase of his trial for failing to introduce psychiatric records and expert testimony which disclosed that appellant suffered from a severe personality disorder. The Court rejected appellant's claim on the ground that appellant had not been prejudiced by this omission. The Court noted that the evidence which the appellant sought to introduce could have had a potentially detrimental effect on the defense's effort to avoid the death penalty because the evidence in question "clearly portrayed the appellant as a highly dangerous person who would be likely to kill again." *Yarris* at 605, 549 A.2d at 531.

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[8] Petitioner's trial counsel explained, as follows, his decision to avoid raising aggravating factors in mitigation of the death penalty: "I was always concerned in every aspect of my evaluation involved how mitigating the facts would be and how aggravating they would be and I took great pains to avoid compounding the egregious and brutal nature of this offense." (N.T. 5/22/96: 28).

In *Buehl,* the Supreme Court was presented with the almost identical scenario. Like the appellant in *Yarris*, the appellant in *Buehl* suffered from a borderline personality disorder. The *Buehl* Court observed that "examination of appellant's psychiatric records reveals damaging comments such as, '. . . gives no evidence of truly wishing to rid himself of drug abuse . . . psychopathic (sociopathic) personality . . . severe obnoxious narcissistic personality . . .' and 'serious potential for increasingly dangerous acting out on his part.'" *Buehl* at 512, 658 A.2d at 781. In light of these comments in appellant's previous psychiatric records, the *Buehl* Court found it unlikely that, but for the admission of this evidence, the outcome of petitioner's sentencing hearing would have been different. *Id.*

In both *Yarris* and *Buehl*, the Supreme Court held that appellants' claims of ineffectiveness of counsel did not provide a basis for relief because prejudice was not demonstrated in either claim. To demonstrate prejudice under the Post-Conviction Relief Act, the petitioner must show that the alleged prejudicial error "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.

C.S. § 9543(a)(2)(i). *See also Commonwealth v. Christy*, 540 Pa. 192, 207, 656 A.2d 877, 884 (1995). Here, the strategic omission of the evaluations by petitioner's trial counsel was designed to effectuate petitioner's best interests and in no way undermined the penalty phase to render the jury's sentencing verdict unreliable. *See Commonwealth v. Carpenter*, 533 Pa. 40, 617 A.2d 1263 (1992).

Petitioner's prior evaluative records are equally as damaging as the petitioners' records in *Yarris* and *Buehl*. Petitioner's records reveal that his history of arrests and convictions for various felonies began when he was a teenager. At the age of sixteen, petitioner was adjudged delinquent and placed on intensive probation for burglary. At age seventeen petitioner was adjudged delinquent on two counts of armed robbery. As part of his probation from these adjudications, petitioner lived in a Kensington Group Home. While living at the group home, petitioner was hospitalized on an out-patient basis at Northeast Community Center for Mental Health, where petitioner was treated by Dr. Phyllis Herman and Dr. Charles Halpern.

Petitioner now claims that his trial counsel was ineffective for not presenting to the jury at the penalty phase the damaging information contained in the evaluative reports performed pursuant to these teenage adjudications. Unquestionably, under *Yarris* and *Buehl*, petitioner's trial counsel made a reasonably designed tactical decision when he chose not to present this information to the jury because of the damaging impact it would have had on petitioner's case. For example, Dr. Halpern's discharge report, written April 14, 1977, stated that attempts to treat William Holland "were fruitless." (Exhibit 2: 18). Dr. Halpern also noted that petitioner is "desperate about avoiding responsibility for self." (Exhibit 2: 18). The report stated that the petitioner went to therapy "because of his legal situation only and withdrew when it clarified." (Exhibit 2: 18). Dr. Halpern diagnosed petitioner with an "unspecified personality disorder," adding that "therapy was not used by [petitioner] productively." (Exhibit 2: 18).

Petitioner is also unable to show that he was prejudiced by trial counsel's avoidance of petitioner's adult post-arrest mental health evaluations. As an adult, the petitioner had, before the instant murder conviction, four arrests and three criminal convictions. On July 31, 1980, the petitioner was convicted on four counts of robbery and two counts of possession of an instrument of crime (PIC). (C.P. Bill of Information Numbers 863, 866, 868, 874, August Term, 1980). A mental health evaluation was performed on August 11, 1980, by Dr. Richard Saul, M.D., at the request of the court. Dr. Saul concluded that the "petitioner reveals no evidence of any psychotic process." Dr. Saul diagnosed the petitioner as having a "schizoid personality disorder," and concluded that the petitioner was capable of standing trial on the pending charges. (Exhibit 3: 2).

On November 6, 1980, the petitioner pled guilty to two counts of robbery, PIC, and criminal conspiracy. (C.P. Bill of Information Numbers 562, 563, 567, October Term, 1980). In a pre-sentence mental health evaluation performed on October 22, 1980, Dr. Richard Saul confirmed his previous diagnosis, adding a secondary diagnosis of drug and alcohol abuse. Dr. Saul concluded that the petitioner "does understand the nature of the charges against him and the possible consequences if found guilty." (Exhibit 4: 2). On December 15, 1980, the petitioner was paroled to an in-patient drug rehabilitation program at Eagleville Hospital.[9] Petitioner was discharged from Eagleville Hospital on January 20, 1981, and reported to the probation department on January 22, 1981.

On February 3, 1981, Linda Riggen, therapist at Eagleville Hospital and Rehabilitation Center, filed a discharge summary. In the summary she stated that, "Mr. Holland was ambivalent about treatment and developing motivation was difficult. His interactions were superficial and at times, hostile." (Exhibit 2: 25). She stated that the petitioner's "progress" and "prognosis" were both "poor." (Exhibit 2: 25). On March 28, 1981, a direct violation of petitioner's parole occurred when the petitioner was again arrested.

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[9] The jury was aware that the petitioner had been previously hospitalized for drug and alcohol abuse. Robert Levin, a Commonwealth witness, stated at the penalty phase that "a condition of the [petitioner's] probation was that he enter an in-patient drug program, I believe it was at Eagleville Hospital." (N.T. 6/12/85: 6.10).

On July 14,1981, the petitioner pled guilty to robbery and simple assault. (C.P. Bill of Information Numbers 1770,1776, April Term, 1981). A mental health examination was performed at the court's request on July 29, 1981, again by Dr. Richard Saul. In that report, Dr. Saul stated that the petitioner reveals "no evidence of delusions or hallucinations. There is much concreteness of thinking. [Petitioner] is oriented as to time person and place." Dr. Saul diagnosed the petitioner as having a "schizoid personality disorder with paranoid elements." (Exhibit 5: 2).

Additionally, before sentencing on October 6, 1981, a presentence investigation was performed by Michael Berg of the Probation Department of the Court of Common Pleas of Philadelphia County. In the report, Mr. Berg stated that "this individual, given his past and present emotional state, and especially his past criminal record which involved robberies, assaults, guns and knives, poses a great risk to the safety of society." (Exhibit 2: 7). Mr. Berg also stated in his evaluation that "the petitioner's crimes are serious, potentially life-endangering, and perhaps most important, senseless." (Exhibit 2: 7).

On January 7, 1985, a Pre-Trial Psychiatric Examination of the petitioner was prepared for the instant charges by Dr. Jay S. Bonovitz, M.D.. Both parties agreed that they would abide by the findings of this independent psychiatrist. (Exhibit 6). Dr. Bonovitz reported that the petitioner's statements reveal "he was quite intoxicated at the time of the crime." (Exhibit 7: 3). The report further stated that there is nothing "to indicate that Mr. Holland did not appreciate the nature and the quality of his acts. On the contrary, Mr. Holland's avoidance of his family, his home, and the police suggests that he felt he had done something wrong and that he was trying to avoid punishment." (Exhibit 7: 3). This psychological evaluation was properly omitted by petitioner's trial counsel in light of the fact that it may have impaired any defense under 42 Pa.C.S. § 9711 (e)(3), that the petitioner did not appreciate the criminality of his act. *See Commonwealth v. Buehl*, 540 Pa. 493, 512, 658 A.2d 771, 781 (1995) (held that evidence which is potentially detrimental to a petitioner's interests is properly omitted).

In Pennsylvania, the approach pursued by trial counsel must be viewed in light of the available alternatives. *Commonwealth v. Clark*, 533 Pa. 579, 586,626 A.2d 154 (1993). A finding of ineffectiveness is appropriate if the alternatives not chosen offered a potential for success substantially greater than the tactics utilized. *Commonwealth v. Pierce*, 515 Pa. 153, 159, 527 A.2d 973, 976 (1987). In this determination, this Court must be highly deferential to the decisions of counsel. *Id.* In other words, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Commonwealth v. McNeil*, 506 Pa. 607, 487 A.2d 802 (1985), *quoting Strickland v. Washington*, 466 U.S. 668, 690-691, 104 S.Ct. 2068, ___ (1984). Petitioner's trial counsel did not present this information to the jury for obvious strategic reasons. This strategy was reasonable in light of the brutal nature of the petitioner's crime, petitioner's long history of committing life threatening crimes, and petitioner's documented disinclination toward treatment and rehabilitation.[10]

Trial counsel omitted the proposed evidence on grounds that it would have had little or no mitigating potency, and would have only served to enrage the jury. Additionally, trial counsel's strategy to avoid the evaluations was reasonably intended to avoid characterizing the petitioner as an habitual criminal. *See Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986), *cert. denied, Peterkin v. Pennsylvania,* 479 U.S. 1070, 107 S.Ct. 962 (1987), *PCRA denial affirmed Commonwealth v. Peterkin*, 538 Pa. 455, 649 A.2d 121 (1994), *cert. denied, Peterkin v. Pennsylvania,* 115 S.Ct. 2569 (1995) (trial counsel's decision not to delve into character evidence during sentencing hearing was not evidence of ineffective counsel where the Commonwealth had damaging evidence of petitioner's bad character which defense counsel did not want disclosed to the jury). In fact, petitioner's trial counsel testified that his omission of the prior evaluative reports was strategically designed to avoid portraying petitioner as an inveterate criminal. *See* N.T. 5/22/96 at 15. In light of the damaging nature of these reports, and the lack of mitigating information contained in them, this Court finds that the mitigating circumstances presented to the jury at petitioner's penalty hearing were within the range of constitutionally required professionally competent assistance. *See Commonwealth v. Cross*, 535 Pa. 38, 47, 634 A.2d 173, 177 (1993). This Court also finds that petitioner's trial counsel's professional judgment to limit his investigation into petitioner's prior presentence reports and psychological evaluations was reasonable under the circumstances.[11]

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[10] Petitioner's PCRA counsel agrees that "[t]he evidence of the instant case, in all likelihood, sickened and infuriated the jury, turning them against the petitioner." (Petitioner's Brief at 8).

After the jury returned the death sentence, two additional presentence mental evaluations were performed on the petitioner. First, a presentence mental health evaluation was performed on June 19, 1985, by Edwin P. Camiel, M.D., of the Psychiatric Evaluation Unit of the Court of Common Pleas.[12] A presentence report was also prepared by Michael Berg on July 2, 1985. Under Pennsylvania procedure these reports are performed after trial and before sentencing. Thus, the information contained in these reports is available only once the trial has concluded. Therefore, any claim that trial counsel was ineffective for not presenting these reports to the jury at the penalty phase is entirely without merit.

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[11] The following exchange at the evidentiary hearing reveals that trial counsel had a reasonable basis to limit investigation into the reports.

> MR. MAJEED: I had spoken to the Defendant's brother who was a police officer and it was clear to me that there was a past record and his past cases.
>
> This Defendant pulled a knife on his brother and the nature of this case involved a knife and I did not think getting into past cases and bringing up past reports and I don't know if there were any reports but I would rather not know. I did not want that to come out to the jury, that he did pull a knife on his brother and that was all in his past history.
>
> MR. WITTELS: How would the pre-sentence and psychiatric reports lead to the jury knowing about his prior record?
>
> MR. MAJEED: Because it would show he had prior interaction with the police and also contain the factual summary of every case, as far as I know, the pre-sentence report.

(N.T. 5/22/96: 17).

Moreover, petitioner does not specify what mitigating information petitioner's adult presentence evaluations would have revealed, or how they would have added to assist in his defense other than to provide cumulative evidence of his background. In Pennsylvania, failure of trial counsel to conduct a more intensive investigation or failure to interview potential witnesses does not constitute ineffective assistance of counsel unless there is some showing that such investigation or interview would have been helpful in establishing the asserted defense, or would have developed more than was already known by trial counsel. *Commonwealth v. Peterkin*, 511 Pa. 299, 317, 513 A.2d 373, 382 (1986), *cert. denied, Peterkin v. Pennsylvania*, 479 U.S. 1070, 107 S.Ct. 962 (1987), *PCRA denial affirmed, Commonwealth v. Peterkin*, 538 Pa. 455, 649 A.2d 121 (1994), *cert. denied, Peterkin v. Pennsylvania*, 115 S.Ct. 2569 (1995); *see also Commonwealth v. Wade*, 501 Pa. 331, 461 A.2d 613 (1983); *Commonwealth v. Wallace*, 495 Pa. 295, 433 A.2d 856 (1981). Additionally, petitioner must sustain the burden of proving how the "'road not taken' . . . would have been beneficial under the facts and circumstances of his case." *Commonwealth v. McNeil*, 506 Pa. 607, 616, 487 A.2d 802, 806 (1985); *Commonwealth v. Anderson*, 501 Pa. 275, 288, 461 A.2d 208, 214; *Commonwealth v. Leonard*, 499 Pa. 357, 453 A.2d 587 (1982); *Commonwealth v. McKenna*, 498 Pa. 416, 446 A.2d 1274 (1982).[13]

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[12] Dr. Camiel's report, which is extremely damaging to the petitioner, includes comments such as:

> [t]he petitioner entered the interview a well developed, well nourished white male who supported a number of tattoos on both arms including the following: "Death before dishonor," a hawk with a skull in its mouth, a wolf's head, a panther, parrot, parrot, a horse, and a cross with two swords and a harp. He also had a tattoo of a pirate lady on his leg. Throughout the interview he was hostile and argumentative.

(Presentence Mental Health Evaluation, 6/19/85: 3).

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[13] Petitioner contends that trial counsel "didn't present any other members of the family, who also had knowledge of the petitioner, for example, his brother in the Air Force, and his sister." (N.T. 7/13/95: 10). Petitioner,

(continued...)

Assuming that petitioner's records were not as damaging as they clearly are, petitioner has still made no showing that the post-conviction evaluations in fact contain any additional mitigating evidence. The Supreme Court will not consider abstract allegations of ineffectiveness of counsel. *Commonwealth v. Smith,* 539 Pa. 128, 134, 650 A.2d 863, 867 (1994), *citing Commonwealth v. Forrest,* 508 Pa. 382, 390, 498 A.2d 811, 815 (1985). A specific factual predicate must be identified to demonstrate how a different course of action by trial counsel would have better served petitioner's interest. *Id.* When a petitioner claims that some sort of evidence should have been introduced at trial, "the petitioner must articulate what evidence was available" and must identify what area of mitigation that evidence supports. *Commonwealth v. Holloway*, 524 Pa. 342, 572 A.2d 687 (1990); *Commonwealth v. Williams,* 537 Pa. 1, 640 A.2d 1251 (1994); *see also Commonwealth v. Blagman,* 350 Pa.Super. 367, 504 A.2d 883 (1986), *appeal denied,* 514 Pa. 645, 524 A.2d 492 (1987) (holding that it is too tenuous and speculative to base a claim of

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[13] (...continued)

however, fails to demonstrate what mitigation these potential witnesses have to offer. Petitioner has also not demonstrated a willingness to have his brother and sister testify in his defense. At a recent evidentiary hearing, petitioner voluntarily waived the right to call his brother and sister to testify. (See N.T. 5/22/96: 65-68).

ineffectiveness of counsel upon omitted testimony). Petitioner has failed to meet this standard.

Petitioner has made no showing that such investigation or evidence would have developed more than was already known by trial counsel. Nor has petitioner shown that such investigation or evidence would have been helpful in establishing additional mitigating circumstances. On the contrary, petitioner's trial counsel did present to the jury at the penalty hearing the following mitigating circumstances pursuant to 42 Pa.C.S. § 9711: (e)(2), the petitioner was under the influence of extreme mental or emotional disturbance; (e)(3), the capacity of the petitioner to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (e)(4), the age of the petitioner, and; (e)(8), other evidence of mitigation concerning the character and record of the petitioner and the circumstances of his offense. Rather than place petitioner's damaging evaluations on the record, petitioner's trial counsel instead strategically chose to present the above mitigating evidence at the penalty phase through the testimony of three witnesses who related the petitioner's personal and psychological background.

Petitioner's trial counsel called petitioner's mother, petitioner's grandmother, and a friend of the petitioner to testify regarding mitigation at the penalty phase.[14] First, petitioner's mother testified that the petitioner, "has been in prison most of his life, in his own mind." (N.T. 6/12/85: 6.14). This testimony went to mitigation as extreme emotional distress under 42 Pa.C.S. § 9711 (e)(2). Then, petitioner's grandmother thoroughly exposed petitioner's psychological background. She described the petitioner as a troubled and lonely boy whose father died when he was six years old. She explained that the petitioner began wetting his bed when his father died, and that he was teased about this by his siblings. She stated that, "Billy needs help. He doesn't understand a lot of things that he did, he doesn't know why he did them. I really think he needs psychiatric help now." (N.T. 6/12/85: 6.18). This testimony supported mitigating evidence that the petitioner was under the influence of emotional disturbance and that he did not appreciate the criminality of his conduct under 42 Pa.C.S. § 9711 (e)(3).[15]

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[14] Petitioner's trial counsel individually met with and interviewed these witnesses before calling them to testify at petitioner's penalty hearing. At evidentiary hearing, petitioner's trial counsel testified:

> I spoke to [petitioners mother, grandmother and his brother] at great length. I spoke to them together and also out of an abundance of caution, I spoke to them separate and individually to see, if anything – one might have been intimidated to say in the other's presence . . . .

(N.T. 5/22/96: 26).

Additionally, petitioner's trial counsel clearly emphasized petitioner's psychological history to the jury during closing argument of the penalty phase when he stated,

> You heard [the petitioner's] family say that it has been quite obvious for a while that [the petitioner] needs psychiatric help. Yet no one ever gave him psychiatric help. The Court has many psychiatrists. Nobody afforded him that help. They couldn't give him a doctor, but now they could give him the final fix. That is what they want you to do.

(N.T. 6/12/85: 6.27). The jury was fully aware of the petitioner's alleged need for psychiatric help. Here, not only does the petitioner's trial attorney stress the importance of the petitioner's mental state, he does it in a most effective way: first, by placing the issue directly in the jury's hands through the most sympathetic witnesses; and second, by circumventing the extremely damaging information contained in petitioner's prior psychological evaluations. Hence, petitioner's trial counsel thoroughly pursued and presented petitioner's mental state in mitigation of the death penalty. *Cf. Commonwealth v. Smith*, ___ Pa. ___, ___, 675 A.2d 1221,1233 (1996) (trial counsel found ineffective where "counsel neither pursued nor presented *any* evidence of mental state at the penalty phase even though some evidence may have existed.") (Emphasis added). Petitioner's claim that his trial counsel did not present petitioner's psychological history in mitigation of the death penalty is without merit.

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[15] The petitioner's grandmother then reiterated this mitigating evidence at the penalty phase, stating, "I really feel the boy needs psychiatric help. He's needed it for a long time. Whether he will get it or not, I don't know. But I really hope he will." (N.T. 6/12/85: 6.21).

Moreover, in *Commonwealth v. Christy*, 540 Pa. 192, 656 A.2d 877 (1995), appellant claimed, as does petitioner here, that trial counsel was ineffective for failing to investigate and present available testimony and medical record evidence of appellant's long history of psychiatric treatment. The Court, rejecting appellant's claim, held that the information available would not have exculpated the appellant, particularly because the reports "had basically concluded appellant had disorders that were classified non-cognitive and, thus, supported no defense recognized in Pennsylvania." *Id.* at 213, 656 A.2d at 887. The Court concluded that "[s]uch alleged failure has not been shown to be error or prejudicial to appellant's case." *Id.*

Here, as in *Christy*, petitioner has not shown that the alleged failure of trial counsel prejudiced the outcome of petitioner's trial.[16] At petitioner's post-conviction relief hearing, petitioner's counsel merely alluded to the areas of mitigation which petitioner claims his trial counsel failed to explore.[17] However, petitioner's counsel has never specified what new mitigation is available to show extreme emotional distress, inability to appreciate the nature of his act, or any other type of mitigation. Therefore, petitioner has not carried his burden of showing that these prior evaluative reports in fact contain any mitigating evidence that was not already before the jury at petitioner's penalty hearing.

This Court sought to ascertain what, if any, additional mitigating information could have been conveyed to the jury at petitioner's penalty hearing. Dr. John S. O'Brien, II, M.D., J.D., psychologically evaluated the petitioner for purposes of this P.C.R.A. petition, and testified as follows:

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[16] The petitioner does not claim insanity in his PCRA petition; nor would the evidence of an anti-social personality disorder meet the M' Naghten test for insanity.

[17] Petitioner's counsel stated that "there was fertile ground that trial counsel could have and should have explored to introduce mitigating circumstances, either acting under extreme emotional duress, or not having the capacity to appreciate the nature and quality of his act, or under the catchall category of mitigating circumstances." (N.T. 7/13/95: 4).

> THE COURT: What is there here that the jury in this case did not know, that your evaluation has uncovered, that is different than what was known, at that time?
>
> DR. O'BRIEN: That is a good question, and I have to say that I don't know exactly what was known by the jury, but some of the variables that I think are highly important include the history of the childhood loss, the history of the behavioral change, the history of his isolative behavior.

(N.T. 12/14/95: 57). It is important to note that *all* this information was before the jury in the penalty phase. Petitioner's trial counsel individually interviewed petitioner's mother and grandmother, and at the penalty phase elicited from both witnesses testimony which reflected each one of these areas of mitigation.

Petitioner's prior evaluative reports would not have established a defense or mitigating circumstance, and therefore trial counsel's failure to investigate and present the reports does not constitute ineffective assistance of counsel. *Smith* at ___, 675 A.2d at 1234 ("trial counsel is not ineffective for failing to submit evidence of mitigation where no such evidence exists"). Not one of petitioner's psychological evaluations, including Dr. O'Brien's evaluation, has ever revealed hereto unknown mitigating factors, nor has any evaluation ever diagnosed petitioner with a cognitive disorder.[18] Hence, petitioner's third claim that the prior evaluative reports "reflected a long history of psychiatric and emotional problems" is without merit.

Petitioner further claims that trial counsel failed to reference precisely the language of the mitigating circumstances as they are written in 42 Pa.C.S. § 9711 (e)(1-8). Petitioner's counsel argued that,

> [trial] counsel didn't say, "Listen, here are the mitigating factors that you ought to consider." So we really can't say that the jury had a fair opportunity to weigh anything. All that happened, in the end, was that the judge read off all of the mitigating circumstances, but there is nothing in the testimony that connects up those mitigating circumstances with anything that the jury heard. There is no connection made by counsel . . . .

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[18] Dr. O'Brien's written psychological evaluation diagnosed petitioner as having a "mixed personality disorder with Schizoid and Antisocial traits," in addition to a history of "substance abuse." (Exhibit D-1 at 3, Report of Dr. John S. O'Brien, filed 10/23/95).

(NT. 7/13/95: 14). This claim is entirely unfounded. In *Commonwealth v. Williams*, 532 Pa. 265, 287, 615 A.2d 716,727 (1992), defense counsel did not precisely reference the language of the mitigating circumstances of which there was some evidence, and did not attempt to characterize certain evidence as falling within a specific mitigating circumstance. Instead, defense counsel in *Williams*, as in the instant case, fully explored, explained, and exposed petitioner's mitigating circumstances through character testimony. In *Williams*, the Supreme Court dismissed the claims which are remarkably similar to those here advanced and stated:

> [b]y not specifically tying his argument to one particular subsection, counsel encouraged a greater range of favorable responses and maximized appellant's chances, given the weakness of the purported evidence in mitigation and the overwhelming evidence of guilt.

Commonwealth v. Williams, 532 Pa. 265, 287, 615 A.2d 716,727 (1992); *see also Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987); *Commonwealth v. Pettus*, 492 Pa. 558, 424 A.2d 1332 (1981); *Commonwealth v. Giknes*, 491 Pa. 215, 420 A.2d 419 (1980). The *Williams* Court found "no sufficient basis upon which to conclude that trial counsel was ineffective in presenting his closing argument with respect to mitigating circumstances during the penalty phase," and accordingly dismissed appellant's claim. *Williams* at 287, 615 A.2d at 727. Here, as in *Williams*, petitioner's trial counsel sufficiently focused the jury's attention during closing argument on the mitigating factors.[19]

In this case, counsel's assistance must be deemed constitutionally effective because the strategy pursued by trial counsel had a reasonable basis designed to effectuate the petitioner's interests. Counsel chose to omit petitioner's post-arrest evaluations because they were performed pursuant to serious otherwise inadmissible crimes the petitioner had committed, and contained significant detrimental information. In light of the fairly logical animus towards the petitioner derived from the gruesome facts of this case, petitioner's trial counsel wisely chose to avoid more fodder which portrayed the petitioner as a hardened criminal who was likely to kill again. Any favorable evidence of mitigation contained in the evaluations was effectively conveyed to the jury at the penalty phase. The alternative strategies not pursued by petitioner's trial counsel simply did not offer a potential for success substantially greater than the tactics utilized. Petitioner's claim must be denied because petitioner has not shown that he was prejudiced by trial counsel's strategy.

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[19] Petitioner's trial counsel raised additional mitigating factors at the penalty phase, stating,

> However, I urge you to keep in mind that he's a young man. That this is his first conviction for any kind of violent crime. He also has a mother.

(N.T. 6/12/85: 6.25). These mitigating factors correspond respectively to the following statutory categories of mitigation: 42 Pa.C.S. § 9711 (e)(4), the age of the defendant at the time of the crime; (e)(1), defendant had no significant history of prior criminal convictions; and (e)(8), any other evidence of mitigation.

Petitioner's fourth claim is that trial "[c]ounsel rendered ineffective assistance by failing to interview and present a mental health expert in mitigation of the death penalty and in support of the mitigating circumstances argued by counsel." (Petitioner's Brief at 8). As noted above, the damaging nature of the previous evaluations far outweighed their mitigating value, and to have called a mental health expert to testify regarding petitioner's psychological history would have opened the door to the damaging information in the records. Moreover, none of the previously performed mental evaluations, of which there were six (6), resulted in a diagnosis of the petitioner with a severe mental disorder. The evaluations repeatedly diagnosed the petitioner as having a mixed personality disorder, and no mental evaluation to date has diagnosed petitioner with any psychosis. Nevertheless, petitioner claims that a "mental health expert, based upon the petitioner's prior history, may have been able to at least explain the petitioner's conduct in the instant case." (Petitioner's Brief at 8). This claim is without merit.

When a petitioner claims that some sort of expert testimony should have been introduced at trial, the petitioner must identify the witness who was willing to offer such evidence, and must also articulate what evidence was available. *Commonwealth v. Williams*, 537 Pa. 1, 640 A.2d 1251 (1994); *Commonwealth v. Smith*, 539 Pa. 128, 650 A.2d 863 (1994) (first-degree murder petitioner's trial counsel would not be found ineffective for failing to present psychological expert testimony in penalty phase absent evidence that petitioner suffered from any type of psychological disorder, and absent identification of area of mitigation to which expert would have testified and which defense counsel did not argue to jury); *see also Commonwealth v. Holloway*, 524 Pa. 342, 572 A.2d 687 (1990). Petitioner has never articulated precisely what evidence was neglected by petitioner's trial counsel.

Petitioner argues that a mental health expert could have offered testimony to the jury in support of two mitigating circumstances: first, that the petitioner was under the influence of extreme mental or emotional disturbance; and second, that the petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were substantially impaired. (Petitioner's Brief at 8). However, petitioner has not shown that there was mitigating evidence actually available to satisfy these categories. Moreover, Dr. O'Brien's testimony does not specify what specific mitigating factors petitioner's trial counsel could have raised through testimony by a mental health expert at the penalty stage. In fact, Dr. O'Brien's diagnosis of petitioner done for this P.C.R.A. as having a "personality disorder" agreed with Dr. Bonovitz's diagnosis done for trial.[20] As noted above, Dr. O'Brien did not offer any mitigating information that was not already before the jury at the penalty hearing. Dr. O'Brien testified that the jury *did* hear the relevant mitigating factors at the penalty hearing, although they did not hear them in as clinical a manner as Dr. O'Brien would have liked.[21] Petitioner's claim that a mental health expert "may" have provided testimony in mitigation of the death penalty is unsubstantiated speculation.[22] Petitioner's trial counsel presented all existing mitigation for this

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[20] There is little if any difference between Dr. O'Brien's psychological evaluation of the petitioner and Dr. Bonovitz's evaluation. For example, Dr. O'Brien stated:

> DR. O'BRIEN: There is no psychosis identified [in Dr. Bonovitz's report], only diagnoses of depression and a personality disorder.
>
> THE COURT: That's accurate according to your evaluation, as well?
>
> DR. O'BRIEN: I also have the same opinion as to his personality disorder, and substance disorder, by history.

(N.T. 12/14/95: 45).

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[21] In the following exchange, this Court attempted to learn what additional mitigating information may have been made available at petitioner's penalty hearing. Dr. O'Brien stated that, in his expert opinion, no other mitigation was available, only a different way of presenting it:

> THE COURT: So, I am just trying to glean what it is, if anything – I think you have done the best you can to answer that question: What it is, if anything, that was neglected, in terms of being presented to the jury, for their consideration of balancing mitigating factors against aggravating factors, finding mitigating factors which, of course, they were properly directed on, and then weighing them, as a jury must do.
>
> DR. O'BRIEN: It may not be so much a question of the actual information, but a summation of the information on the part of an individual, looking at it and evaluating it, and providing it in a summarized fashion, so that at least one other alternative way of thinking about the information is presented to the jury, so that they can at least consider that information in arriving at a sentence.
>
> I don't know if it is really so much a question of additional factors or sudden revelations that are relevant, as much as it is a coherent presentation of how these various factors or trauma's affect an individual, and

(continued...)

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[21](...continued)
whether or not he may need to be considered differently than an ordinary person.

(N.T. 12/14/95: 62-63).

[22] This Court inquired into the possibility that petitioner's trial counsel may have overlooked mitigating information. The following exchange, *inter alia*, reveals that additional mitigation was not available:

> THE COURT: Was there anything more to pursue specifically with regard to either a duress, a mental duress mitigation factor or some kind of mental impairment mitigation factor beyond what you did with regard to the grandmother, specifically, and the mother; was there anything more you knew of --
>
> MR. MAJEED: As I said, to pursue those things, Your Honor, I was looking for two criteria and I would be constrained by ethics of my profession, one, there has to be some minimal, factual basis, some good faith basis to pursue them and in spite of these extensive interviews, neither of these two criteria were met to pursue these angles in this case. It would have to be something totally manufactured and lacking in any factual basis.

(N.T. 5/22/96: 31).

horrendous crime by the most effective strategy he believed feasible under the ethical constraints of his profession. This Court must be highly deferential to the strategic decisions of counsel. *Pierce*, 515 Pa. at 159, 527 A.2d at 976. Therefore, petitioner has not shown that he was prejudiced by his trial counsel's decision not to call an expert medical witness at the penalty stage.

Petitioner also claims that trial counsel rendered ineffective assistance by failing to recall, during the penalty phase of the trial, Dr. Bonovitz, an expert on drug and alcohol abuse and the effects of this abuse on the cerebral cortex." (Petitioner's Brief at 9). Petitioner claims that Dr. Bonovitz "could have and would have offered significant testimony and explanations related to the petitioner's conduct at the time the victim was assaulted." (Petitioner's Brief at 9). This claim is entirely without merit.

At the close of the guilt phase of petitioner's trial, the court instructed the jury on voluntary intoxication. (NT. 6/11/85: 5.142). The jury, in returning a verdict of first-degree murder, rejected petitioner's substantial impairment defense under 42 Pa.C.S. § 9711 (e)(2), (e)(3). Dr. Bonovitz, the last witness called at the guilt phase of petitioner's trial, testified to the effects of alcohol on the cerebral cortex, stating in response to a hypothetical posed by petitioner's trial counsel, that "three or four beers are enough to loosen inhibitions, I think to some extent, but I am unable to be more precise than that." (N.T. 6/11/85: 5.24).[23] Any information Dr. Bonovitz may have offered at the penalty phase would have been cumulative of the already rejected testimony he gave at the guilt phase. Petitioner cannot show prejudice, and therefore his claim is rejected.

Petitioner also claims that his trial counsel was ineffective for failing to recall Dr. Bonovitz to present evidence of petitioner's drug use in mitigation of the death penalty. It is well settled that counsel will not be found ineffective where an alleged failure to present mitigating evidence is not specifically linked to a mitigating circumstance. In *Commonwealth v. Crawley*, 541 Pa. 408, 663 A.2d 676 (1995), appellant alleged that trial counsel was ineffective for failing to put on, as mitigating circumstances, evidence of appellant's history of drug use. The Court dismissed appellant's claim on grounds that appellant "failed to link his drug use with any mitigating circumstances," "failed to show that counsel knew or should have known of the drug use," failed to show "how this drug use was relevant to the murders (i.e, that he was influenced by drugs at the time of the murders)," and because "evidence of appellant's illicit drug use would have served only to further inflame the jurors against his client." *Crawley* at 417, 663 A.2d at 680. Petitioner's claim that his trial counsel was ineffective for not recalling Dr. Bonovitz to testify to petitioner's prior drug use must be rejected for the above stated reasons under *Crawley*.

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[23] There was some evidence on the record which indicated that the petitioner drank three or four beers the night of the incident. (N.T. 6/11/85: 5.23).

The denial of this claim is also mandated by the Third Circuit Court of Appeals' holding in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991).[24] In *Zettlemoyer*, appellant claimed that his trial counsel was ineffective for not recalling a psychologist at the penalty phase of his Pennsylvania homicide trial. The Court, noting that this doctor had been "the last witness during the guilt phase [and that] the jury heard his testimony less than 24 hours before the sentencing hearing," rejected the petitioner's claim, stating that "we see no deficiency in counsel's decision not to recall [the psychologist], as the choice plainly was well within the range of a professionally reasonable judgment." *Zettlemoyer v. Fulcomer*, 923 F.2d at 299; *see also Commonwealth v. Yarris*, 519 Pa. 571, 605, 549 A.2d 513, 531 (1988) (trial counsel's strategy not to present expert psychiatric testimony of diminished capacity at sentencing phase was not ineffective assistance of counsel).

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[24] The *Zettlemoyer* Court stated that it "consider[ed] counsel's failure to recall [the psychologist] in the context of Pennsylvania law." *Zettlemoyer*, 923 F.2d at 298.

In the instant case, Dr. Bonovitz was the last witness called at the guilt phase of petitioner's trial. Thus, petitioner's trial counsel cannot be held ineffective for failing to recall Dr. Bonovitz when his testimony on diminished capacity was still "quite fresh" in the jury's mind. Here, as in *Zettlemoyer*, the jury had a very complete psychological picture of the petitioner. Also in the instant case, as in *Zettlemoyer*, all the evidence that was introduced at trial was incorporated into the penalty phase. (N.T. 6/12/85: 6.5). The jury was directed to consider the testimony which they heard throughout the trial, including the testimony given the previous day by Dr. Bonovitz.[25] Any testimony Dr. Bonovitz could have offered at the penalty phase would have been repetitive of the information he offered at the guilt phase. The petitioner is unable to show that trial counsel's decision not to recall Dr. Bonovitz prejudiced the petitioner, and therefore petitioner's claim is rejected.

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[25] The jury was instructed by the court at the close of the penalty phase that,

> all the evidence for both sides, including the evidence you heard before during [sic] the trial in chief, as to aggravating and mitigating circumstances is important and proper for you to consider.

(N.T. 6/12/85: 6.54).

Petitioner also claims that Dr. Bonovitz could have offered testimony at the penalty phase that was disallowed at the guilt phase. This claim is disingenuous. The trial court did not permit Dr. Bonovitz to testify at the guilt phase regarding the amount of alcohol the petitioner told Dr. Bonovitz he consumed the night of the murder. The trial court properly disallowed this testimony on grounds that it was hearsay. (N.T. 6/11/85: 5.10-5.14). Specifically, in his report Dr. Bonovitz commented that, "[b]ased on Mr. Holland's statements, he was quite intoxicated at the time of the crime." (Exhibit 7 at 3). Dr. Bonovitz then stated in the report that "[t]here is nothing, however, to indicate that Mr. Holland did not appreciate the nature and the quality of his acts." (Exhibit 7 at 3). In light of this comment, and others like it, petitioner's trial counsel made a reasonable tactical decision to avoid this damaging information at this crucial stage of petitioner's trial.[26] Petitioner has failed to show that the alternatives not chosen by his trial counsel "offered a potential for success substantially greater than the tactics utilized," and therefore his claim is denied. *See Commonwealth v.*

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[26] Petitioner's trial counsel testified at the evidentiary hearing that "[Dr. Bonovitz] could not say that this Defendant was under the influence of alcohol to the extent it would affect his mental or psychological picture. I don't think that at any time from then until now he has made such a statement." (N.T. 5/22/96: 11).

Pierce, supra, 515 Pa. 153, 159, 527 A.2d 973, 976 (1987).

The petitioner's fifth claim concerns the instruction the trial court gave before the jury retired to consider the sentencing verdict. Petitioner contends that, "the court did not specifically and affirmatively instruct the jury that the [sic] need not be unanimous in finding any mitigating circumstances that was [sic] put forward by defense counsel." (Petitioner's Brief at 10). Petitioner further contends that "[a]lthough the court did instruct the jury that all twelve must agree as to the finding of an aggravating circumstance it was entirely possible that this unanimity of aggravating circumstances was extended by the jury in their deliberations as to the mitigating circumstances put forward by defense counsel." (Petitioner's Brief at 10).

The instruction that the jury must be unanimous in its *verdict* did not mislead the jury to think that it must be unanimous in finding mitigating circumstances. The Supreme Court has repeatedly rejected this claim and it must be rejected here because petitioner has not offered any reason why this Court should depart from the Supreme Court's established precedent. *See e.g. Commonwealth v. Banks,* 540 Pa. 143, 153, 656 A.2d 467, 472 (1995) (courts are not required to explicitly instruct the jury that unanimity is not required for finding mitigating circumstances); *see also Commonwealth v.*

Williams, 524 Pa. 218, 570 A.2d 75 (1990); *Commonwealth v. O'Shea*, 523 Pa. 384, 567 A.2d 1023 (1989), *cert. denied*, 498 U.S. 881, 111 S.Ct. 225, (1990); *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27, *cert. denied*, 494 U.S. 1038,110 S.Ct. 1500 (1990); *Commonwealth v. Edwards*, 521 Pa. 134, 555 A.2d 818 (1989).

Petitioner cites *Commonwealth v. Billa*, 521 Pa. 168, 555 A.2d 835 (1989), in support of his claim. In *Billa*, the trial court specifically and prejudicially instructed the jury that they must be unanimous to find a mitigating circumstance.[27] In the instant case, there was no such instruction. Here, the trial court instructed the jury,

> Remember again that your verdict must be unanimous. It cannot be reached by any majority vote or any person's vote. It must be the verdict of each and every one of you.

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[27] In *Billa*, the last instruction the trial court gave to the jury at the conclusion of the penalty phase stated,

> [b]ut if you find an aggravating circumstance or a mitigating circumstance, you will find that it must be unanimous."

Commonwealth v. Billa, 521 Pa. 168, 186, 555 A.2d 835, 844 (1989).

> To repeat, if you find one aggravating circumstance and no mitigating circumstances, your verdict will be death. If you find no aggravating circumstances and no mitigating circumstances, the sentence will be life. If you find one aggravating and one mitigating, it will be life.

(NT. 6/12/85: 6.55). At no time did the trial court in the instant case state that the jury must be unanimous to find mitigating circumstances as did the trial court in *Billa*. Rather, the trial court gave a general instruction similar to the one given at the guilt phase of the trial wherein the court simply reminded the jury of the votes required to render a decision.

The standard in Pennsylvania for evaluating a collateral attack on the stewardship of counsel is for the court to presume that counsel was effective, and the petitioner is required to show that counsel's "ineffectiveness was of such magnitude that the verdict essentially would have been different absent counsel's alleged ineffectiveness." *Commonwealth v. Howard*, 538 Pa. 86, 100, 645 A.2d 1300, 1308 (1994); *see also Commonwealth v. Pierce*, 515 Pa. 153, 162, 527 A.2d 973, 977 (1987) (to prevail on a collateral claim of ineffectiveness, petitioner is required to show actual prejudice). The *Pierce* standard is different from the harmless error analysis that is applied when determining whether the trial court erred in taking or failing to take certain action. *Howard* at 100, 645 A.2d at 1308. This distinction arises from the difference between a collateral attack on the stewardship of counsel, and a direct attack on error occurring at trial. The *Pierce* collateral attack standard requires the petitioner to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. *Id.* Petitioner has not met this rigorous standard.

Petitioner has made no showing that the court's instruction alone produced an adverse effect on the outcome of the proceedings. Nor has petitioner shown that the outcome of the jury's deliberations would have been different had the trial court used the words "unanimously find one aggravating circumstance" as opposed to "find one aggravating circumstance."[28] Petitioner has therefore failed to show that prejudice resulted from the trial court's instruction. *See Commonwealth v. Morales,* 508 Pa. 51, 72, 494 A.2d 367, 378 (1985) (holding that no possibility of prejudice existed where the trial court's instruction was "adequate and substantially of the form and substance" required by the sentencing code). In the instant case, the trial court gave the substance of the statutory instruction in slightly different words. Hence, petitioner is unable to show that he was prejudiced by the court's instruction.

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[28] The applicable sentencing code provides that, "before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

> (iv) the verdict must be a sentence of death if the jury unanimously finds at least on aggravating circumstance specified in subsection (d) and no mitigating circumstance.

(42 Pa.C.S. § 9711 (c)(iv)).

Were the petitioner able to establish the prejudice necessary to sustain a claim of ineffective assistance of counsel under *Pierce*, this Court would still affirm the judgment of sentence against the petitioner. The reason for this is that *Mills v. Maryland*, 486 U.S. 365 (1988), and its progeny upon which petitioner relies, were not announced until three years after petitioner's trial. The Pennsylvania Supreme Court has consistently held that counsel cannot be found ineffective for failing to anticipate changes in the law. *Commonwealth v. Fahy*, 537 Pa. 533,645 A.2d 199 (1994); *Commonwealth v. Johnson*, 516 Pa. 407, 532 A.2d 796 (1987); *Commonwealth v. Garrity*, 509 Pa. 46, 500 A.2d 1106 (1985); *Commonwealth v. Triplett*, 476 Pa. 83, 381 A.2d 877 (1977). Nor does the severity of sentence in the present case affect the application of this principle, because the Pennsylvania Supreme Court has previously applied it under similar facts. *See Commonwealth v. Yarris*, 519 Pa. 571, 605-606, 549 A.2d 513, 530-531 (1988), *cert. denied*, 491 U.S. 910, 109 S.Ct. 3201 (1989).

Lastly, petitioner's claim is rejected because petitioner has failed to show, pursuant to 42 Pa. C.S. § 9711 (h)(3), that: (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; (ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d); or (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the petitioner. Petitioner's counsel cannot be found ineffective for failing to object to the court's instruction regarding unanimity. Accordingly, petitioner's fifth claim is denied.

Petitioner's sixth and final claim is that petitioner's "appellate counsel rendered ineffective assistance by failing to challenge the above ineffectiveness of trial counsel by raising these issues of prior counsel's effectiveness on direct appeal." (Petitioner's Brief at 11). This claim is entirely specious. Petitioner's appellate counsel, the experienced and extremely well respected Norris E. Gelman, Esquire, raised numerous claims of ineffectiveness of trial counsel on direct appeal to the Supreme Court. This Court has found, *supra*, that none of the claims of ineffectiveness to which petitioner now alludes prejudiced petitioner. Counsel cannot be found ineffective for having elected not to raise meritless claims. *Commonwealth v. Pettus*, 492 Pa. 558, 424 A.2d 1332 (1981); *Commonwealth* *v. Giknis*, 491 Pa. 215, 420 A.2d 419 (1980). Accordingly, petitioner's sixth claim is rejected.

For the foregoing reasons the P.C.R.A petition is denied and the stay of execution entered on January 25, 1995, is hereby lifted.

BY THE COURT:

/s/ ____________________
GREENSPAN, J.